IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
APPELLATE JURISDICTION

APL No. 284 OF 2018 & IA No. 1313 OF 2018 &
IA No. 978 OF 2024

Dated: 19th December, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Green Infra Wind Solutions Limited
Through its authorised signatory
5th Floor, Tower C, Building No. 8, DLF Cybercity, Gurgaon, Haryana -122002 … Appellant(s)

Versus

1. **Andhra Pradesh Electricity Regulatory Commission**
Through its Chairman
4th Floor, Singareni Bhavan, Red Hills,
Hyderabad 500 004 … Respondent No.1

2. **Southern Power Distribution Company of Andhra Pradesh Limited**
Through its Chairman & Managing Director
Beside Srinivasa Kalyanamandapam,
Tiruchanur Road, Tirupathi – 517 501 … Respondent No.2

3. **Eastern Power Distribution Company of Andhra Pradesh**
Limited, Through its Chairman & Managing Director
P & T Colony, Seethammadhara …
Visakhapatnam – 530 020 … Respondent No.3

4. **M/s Sri Vijayeebhava Enterprises Private Ltd**
Through its authorized signatory
Flat. No. 1602, A-Block, Meenakshi Trident

Towers Opp: Ramky Towers, Gachibowli,
Hyderabad- 500 032 … Respondent No.4

5. **M/s Karam Chand Thapar & Bros Limited**
Through its Chairman & Managing Director … Respondent No.5
Thapar House, #25, Brabourne Road,
Kolkata

6. **M/s Jindal Aluminium Ltd**
Through its Chairman
Jindal Nagar, Tumkur Road,
Bangalore – 560 073 … Respondent No.6

7. **M/s Rayala Wind Power Company Private Ltd.**
Through its authorized signatory
Plot No.1366, Road No 45, Jubilee Hills,
Hyderabad – 500 033 … Respondent No.7

8. **M/s Sunwin Power Tech India (P) Ltd**
Through its authorized signatory
6-3-883/A/10, Padmavathi place,
Punjagutta, Hyderabad … Respondent No.8

9. **M/s Vibrant Green Tech India Ltd**
Through its authorized signatory
D.No.4-3-377/1,Bank Street,
Koti, Hyderabad – 500 095 … Respondent No.9

10. **M/s Mythrah Vaayu (Indravathi) Pvt Ltd**
Through its Chairman, 8001 S.No.109,
Q-City Nanakramguda,
Gachibowli, Hyderabad - 500032 … Respondent No.10

11. **M/s Mangalam Fashions Limited**
Through its authorized signatory
Registered Office Address: 22,
Camac Street, Kolkata-700 016 … Respondent No.11

12. **M/s Woodside Fashions Limited**
Through its authorized signatory
22, Camac Street, Kolkata – 700016
(West Bengal) … Respondent No.12

13. **M/s Levelstate Systems Pvt. Ltd**
Through its authorized signatory
Regd.Office: Productivity Road, Signature I,
404, Vadodara - 390 007 … Respondent No.13

14. **M/s Ushodaya Enterprises Private Limited**
Through its authorized signatory
Eenadu Corporate Office, Ramoji Film City
Anajpur Village, Hayathnagar Mandal. R.R. Dist - 501 512, Telangana State … Respondent No.14

15. **M/s Shrinath Gum & Chemicals**
Through its authorised signatory
E-278, M.I.A. 2nd Phase, Basni,
Jodhpur – 342 005 (India) … Respondent No.15

16. **M/s Shree Ram Industries**
Through its authorized signatory
C-80, Marudhar Industrial Area, Basni -2,
Jodhpur - 342 005 … Respondent No.16

17. **M/s Om Prakash Soni, 113,**
Through its authorized signatory
PWD Colony, Jodhpur … Respondent No.17

18. **M/s Sai Pet Preforms, Sy No 157/2**
Through its Managing Partner
Sanklapur Industrila Estate,
Hospet- 583 201, Karnataka … Respondent No.18

19. **M/s Manoj Agarwalla**
Through its authorized signatory
PO- Dhansar, Dhanbad,
Jharkhand – 828 106 … Respondent No.19

20. **M/s Imperial Arts, G-618-619,**
Through its authorized signatory
EPIP Boranada, Jodhpur – 342 012 … Respondent No.20

21. **M/s Eenadu Television Pvt Ltd**
Through its authorized signatory
H.No.1-10-76, Fair Fields, Begumpet,

Hyderabad – 500 016 … Respondent No.21

22. **M/s Hi-Tech Systems & Services Ltd**
Through its authorized signatory
White House, 119, Park street,
Kolkata – 700 016 (WB) … Respondent No.22

23. **M/s Prince Art Exporter**
Through its authorized signatory
F-288-89, M.I.A., 2nd Phase, BASNI,
Jodhpur - 342 005 … Respondent No.23

24. **M/s Orange Anantapur Wind Power Pvt Limited**
Through its authorized signatory
F-9, First Floor, Manish Plaza 1, Plot No.7,
MLU, Sector-10, Dwaraka, Delhi – 110 075 … Respondent No.24

25. **M/s Kaushaliya Devi Dhoot**
Through its authorized signatory
Lodha Street, 1st A Road, Sardarpura,
Jodhpur – 342 011 … Respondent No.25

26 **M/s Satyanaryana Dhoot**
Through its authorized signatory
Lodha Street, 1st A Road, Sardarpura,
Jodhpur- 342 001 (Rajasthan) … Respondent No.26

27. **M/s Chimique (India) Ltd**
Through its authorized signatory
13/3 New Grain Market,
Siwani Mandi-127 046, Bhiwani, Haryana … Respondent No.27

28. **M/s Rajasthan Gum Private Limited,**
Through its authorized signatory
H.O: E-8-9, G-234-236 & SP-6
Agro Food Park, Boranada,
Jodhpur – 342012 (Rajasthan) … Respondent No.28

29. **M/s Jai Bharat Gum & Chemicals Ltd**
Through its authorized signatory
Regd. Office: Siwani Mandi -127 046,
Distt. Bhiwani, Haryana … Respondent No.29

30. **M/s Dinesh Enterprises**
Through its authorized signatory
E-274, M.I. Area, II Phase, Basni,
Jodhpur - 342 005 … Respondent No.30

31. **M/s Sandla Wind Power Project Limited**
Through its authorized signatory
RO: 11-103, GCP Business Center, Vijay Char Rasta Memnagar, Ahmedabad, Gujarat, India – 380 052 … Respondent No.31

32. **M/s Jed Solar Parks Pvt Ltd.,**
Through its authorized signatory
Plot No.1131/A, Sai Square
Road No 36, Jubilee Hills,
Hyderabad – 500 033 … Respondent No.32

33. **M/s Poly Solar Parks Pvt Ltd.,**
Plot No.1131/A, Sai Square,
Road No. 36, Jubilee Hills,
Hyderabad – 500 033 … Respondent No.33

34. **M/s Hetero Wind Power (Pennar) Pvt., Ltd**
Through its authorized signatory
#7-2-A2, 3rd Floor, Industrial Estate, … Respondent No.34
Sanath Nagar, Hyderabad-500 018

35. **M/s KCT (20.4 MW) Renewable Energy Pvt Ltd**
Through its authorized signatory
#25, Thapar House, Brabourne Road,
Kolkata – 700 001 … Respondent No.35

36. **M/s Ostro Anantapur Pvt Ltd**
Through its authorized signatory
Unit No.G-0, Ground Floor, Mira Corporate Suites Mathura Road, 1&2 Ishwar Industrial Estate, New Delhi – 110 065 … Respondent No.36

37. **M/s Orange Uravakonda Wind Power Pvt Ltd**
Through its authorized signatory
F-9, First Floor, Manish Plaza 1, Plot No.7,

MLU Sector-10, Dwaraka, Delhi – 110 075 … Respondent No.37

38. **M/s ZR Renewable Energy Pvt Ltd**
Through its authorized signatory
6-3-249/6, Road.No.1, Banjara Hills,
Hyderabad – 500 034 … Respondent No.38

39. **M/s Sterling Agro Industries Ltd,**
11th Floor,
Through its authorized signatory
Aggarwal Cyber Plaza-II, Netaji Subhash Place, Pithampura – 110 034 … Respondent No.39

40. **M/s Danu Wind Parks Pvt Ltd**
Through its authorized signatory
1-111/RC/11-B & 12-B/201, Survey No.60
Raghavendra Colony, Kondapur - 500 084 … Respondent No.40

41. **M/s NATCO Power Pvt. Ltd**
Through its authorized signatory
Natco House, Road No.2, Banjara Hills,
Hyderabad – 500 034 … Respondent No.41

42. **M/s RBA Properties Ltd,**
Through its authorized signatory
22, CAMAC Street,
Kolkata -700 020 … Respondent No.42

43. **M/s Renew Wind Energy Pvt Ltd**
Through its authorized signatory
10th floor, DLF Square, M-Block,Jacaranda Marg, DLF City, Phase-II, Gurgaon-122 002 … Respondent No.43

44. **M/s Atria Wind Power Private Limited**
Through its authorized signatory
Atria Power 1st, No.11 Commissariat Road,
Bangalore - 560 025 … Respondent No.44

45. **M/s Ranganayaka Spinning Mills Pvt Ltd**
Through its authorized signatory
Room No.304, AP Cotton Association Building, Lakshmi Puram,
Guntur – 522 007, Andhra Pradesh … Respondent No.45

46.	**M/s Tata Power Renewable Energy Limited** Through its authorized signatory A Block, 34, Sant Tukaram Road Carnac Bunder, Mumbai – 400 009, Maharashtra	…	Respondent No.46
47.	**M/s Mytrah Vayu (Tungabadra) Pvt Ltd** Through its authorized signatory 8001, Q-City, S.No.109, Nanakramguda Gachibowli, Hyderabad - 500 032	…	Respondent No.47
48.	**M/s. Vayu Urja Bharat Private Limited** Through its authorized signatory F.No.402, D.No.1-2-605, Vaibhav Kunj Apartment Lower Tank Bund, Hyderabad	…	Respondent No.48
49.	**M/s. Ostro AP Wind Private Limited** Through its authorized signatory Unit G-0, Ground Floor, Mira Corporate Suites1 & 2 Industrial Estate Mathura Road, New Delhi – 110 065	…	Respondent No.49
50.	**M/s. Ostro Andhra Wind Private Limited** Through its authorized signatory Unit G-0, Ground Floor, Mira Corporate Suites 1 & 2 Industrial Estate, Mathura Road, New Delhi – 110 065	…	Respondent No.50

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Sidhant Kumar for Res. 3

Ananga Bhattacharyya
Rohit Rao. N for Res. 32

Ananga Bhattacharyya
Rohit Rao. N for Res. 33

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

Can a generic preferential tariff order passed with respect to wind power generation plants, whereby a levelized tariff was fixed for the entire useful life of the said plant of 25 years, and which tariff was thereafter incorporated in a Power Purchase Agreement to be firm for a period of 25 years, be amended mid-way by the Regulatory Commission?. If so, can the power of amendment be exercised only to deny the Wind Power Generators the benefit of the Govt of India scheme which made the Generation Based Incentive of Rs.0.50 per unit available to them over and above the tariff determined by the State Regulatory Commission?. Would such exercise of the power to amend not fall foul of Section 86(1)(e) of the Electricity Act which requires the State Regulatory Commission to promote generation of electricity from renewable sources?. These questions, among others, arise for consideration in the present appeal.

A Generation Based Incentive (GBI) scheme for Grid interactive wind power projects was notified by the Govt of India on 17.12.2009. The said Scheme, which was thereafter extended by proceedings dated 04.09.2013 sanctioned a Generation Based Incentive of Rs. 0.50/kWh to certain Wind Power Generators to enhance the availability of power to the Grid, and expressly stipulated that the said GBI benefit was over and above the tariff fixed by the State Regulatory Commissions. The Electricity Act does not expressly provide for determination of a generic preferential tariff, that too

a levelized tariff spread over the entire duration of the useful life of a generator of around 25 years. It is with a view to promote generation of electricity from renewable sources that the APERC framed Regulations in this regard under Section 181 of the Electricity Act.

The Andhra Pradesh Electricity Regulatory Commission framed the APERC (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulation, 2015 ("the 2015 Regulations" for short) providing for determination of such a levelized tariff. In exercise of the powers conferred by the 2015 Regulations, the APERC passed two suo-motu generic tariff orders, the first on 01.08.2015 and the second on 26.03.2016 determining a levelized tariff of Rs.4.84 per unit for the entire useful life of the project of 25 years. The stipulated tariff, in the PPA dated 18.02.2017 of Rs. 4.84/kWh, was in terms of the tariff fixed by the generic preferential tariff order passed by the APERC in OP No. 13 of 2016 dated 26.03.2016.

The purported exercise of reducing the tariff, determined in terms of the suo-motu generic tariff order in O.P. No.13 of 2016 dated 26.03.2016, was undertaken by the APERC, and the impugned order in O.P.No.1 of 2017 dated 28.07.2018 was passed directing deduction of GBI of Rs.0.50 per unit from the generic levelized tariff of Rs.4.84 per unit.

The present Appeal is filed challenging the Order passed by the Andhra Pradesh Electricity Regulatory Commission (the "APERC" for short) in OP No. 1 of 2017 dated 28.07.2018 wherein it, *inter-alia,* held that: (a) the benefit of Generation Based Incentive (ie "GBI" for short) under the GBI Scheme issued by the Central Government, if availed by a wind generator, has to be factored in the tariff determined under the 2015 Regulations, and under the Tariff Orders dated 01.08.2015 and 26.03.2016; (b) an inadvertent omission to give effect to Regulation 20 of the 2015 Regulations by the APERC, which has infringed the rights of AP Discoms, confers jurisdiction on the APERC to revisit the tariff; and (c) AP

Discoms are permitted to retrospectively deduct the GBI benefit availed by the wind power generators, including the appellant, from the date of filing of the petition (ie on 14.02.2017) till such time the GBI benefit was availed, from the tariff of the wind generators. In effect, the APERC allowed AP Discoms to retrospectively deduct the amount of GBI from the generic tariff determined by it, and withdrew the benefit which was available to the appellant under the GBI Scheme.

II. FACTS TO THE EXTENT RELEVANT:

On 17th December 2009, the Ministry of New and Renewable Energy notified the GBI Scheme which provided incentive to wind electricity producers at the rate of INR 0.50 per unit of electricity fed into the grid for the purpose of promoting renewable energy generation. The GBI Scheme was extended by the MNRE on 4th September 2013. The Appellant availed "Generation Based Incentive" ("GBI" for short) under the Extended Scheme. The Respondent Commission notified the 2015 APERC RE Regulations in the official gazette on 31st July 2015, and the 2015 Regulations came into force from that date. By the order, passed in OP No. 13 of 2016 dated 26th March, 2016, the APERC determined the generic preferential tariff for projects set up during 2016-17. While the APERC accounted for the benefit of accelerated depreciation, in determining the tariff in accordance with Regulation 20, it did not factor in the GBI availed by the Appellant, and other similarly situated Wind Power Generators, under the Extended Scheme.

The AP DISCOMs, by letter dated 10th December 2016, requested the Respondent Commission to amend the generic Tariff Order to pass on the benefit of GBI to AP DISCOMs. No action was, however, taken by APERC pursuant thereto. The AP DISCOMs filed OP No. 1 of 2017 on 14th February, 2017 seeking amendment of the Generic Tariff Orders, and thereby pass on the GBI benefit, availed by Appellant, to the AP

DISCOMS.

Just four days thereafter, the AP DISCOMs executed a Power Purchase Agreement with the Appellant on 18th February,2017 (the "**PPA**") pursuant to the Generic Tariff Order passed in OP No. 13 of 2016 dated 26th March, 2016, . The tariff stipulated in the said Generic Tariff Order was incorporated in Clause 2.2 of the PPA. While OP No. 1 of 2017 was pending adjudication, APERC, by its order dated 13TH December 2017, granted its approval to the PPA, subject to the outcome of the proceedings in OP No. 1 of 2017. By the Impugned Order dated 28.07.2018, the Respondent Commission allowed OP No. 1 of 2017, and passed on the GBI benefit to the AP DISCOMs. Aggrieved thereby, the Appellant has filed the present appeal, *inter alia,* seeking to have the Impugned Order set aside, and to direct refund of the amount deducted by the Respondent-AP DISCOMs towards GBI granted to them by the Government of India.

III. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant and Sri Buddy Ranganadhan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms. It is convenient to examine the rival contentions under different heads. Before doing so, it is useful to take note of the contents of the GBI scheme, the relevant provisions of the 2015 Regulations, both the suo-motu generic tariff orders, the PPA, the order in OP**.** No. 5 of 2017 dated 13.07.2018, and the impugned order in OP.No.1 of 2017 dated 28.07.2018, albeit in brief.

IV. GENERATION BASED INCENTIVE SCHEME:

The Ministry of New and Renewable Energy, Wind Power Division, Government of India, by its proceedings dated 17.12.2009, formulated a Scheme for Implementation of Generation Based Incentives (GBI) for Grid Interactive Wind Power Projects. Clause-1 of the said Scheme relates to

the Objectives of the Scheme, and provides that the objectives are (i) to broaden the investor base and create a level playing field between various classes of investors, (ii) to incentivise higher efficiencies with the help of a generation/outcome based incentive, and (iii) to facilitate entry of large independent power producers, and foreign direct investors to the wind power sector. Clause 2 relates to Incentive and duration, and Clause 2.1 stipulates that, under the scheme, a GBI will be provided to wind electricity producers @ Rs.0.50 per unit of electricity fed into the grid for a period not less than 4 years, and a maximum period of 10 years, in parallel, with accelerated depreciation on a mutually exclusive manner with a cap of Rs.62 lakhs per MW; the total disbursement in a year will not exceed one fourth of the maximum limit of the incentive i.e. Rs.15.50 lakhs per MW during the first four years; the scheme will be applicable to a maximum capacity limited to 4000 MW during the remaining period of the 11th Plan period; the provision of GBI will continue till the end of the 11th Plan period; however, provision of accelerated depreciation in parallel with GBI will continue till the 11th Plan period or introduction of Direct Tax Code, whichever is earlier; clause 2.2 stipulates that GBI would be available for wind turbines commissioned after the issue of this scheme, and commissioned on or before 31.03.2012 and would be governed by the Guidelines. Clause 4 relates to implementation arrangements, and Clause 4.6 provides that this incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States; in other words, this incentive that is sanctioned by the Union Government to enhance the availability of power to the grid will not be taken into account while fixing tariff by State Regulators. Clause 5 relates to Financial Outlay, and Clause 5.1 stipulates that the financial liability during the 11th Plan is estimated to be Rs.380 crore, which would be met by the Ministry from its existing Plan allocation.

The said Scheme was extended, by proceedings dated 04.09.2013, for continuation of Generation Based Incentive (GBI) for Grid Interactive Wind Power projects for the 12th Plan period. Under Clause 2.1 there-under, the GBI would be provided to wind electricity producers @ Rs.0.50 per unit of electricity fed into the grid for a period not less than 4 years, and a maximum period of 10 years with a cap of Rs.100 lakhs per MW; the total disbursement in a year will not exceed one fourth of the maximum limit of the incentive i.e. Rs.25.00 lakhs per MW during the first four years; the GBI scheme will be applicable for the entire 12th Plan period having a target of 15,000 MW. Clause 4.6 of the extended scheme dated 04.09.2013 stipulates that this incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States; in other words, this incentive, that is sanctioned by the Union Government to enhance the availability of power to the grid, will not be taken into account while fixing tariff by the State Regulars. Clause 5 relates to Financial Outlay, and Clause 5.1 stipulates that the financial liability, during the 12th Plan, is estimated to be Rs.4500 crore (including the committed liability towards the projects commissioned during the 11th Plan period (under the GBI Scheme which existed at that point of time), which would be met by the Ministry from its existing Plan allocation; and the total budgetary requirement for the scheme would be Rs.16,364 crores, which would spill over in the 13th and the 14th Plan period.

V. 2015 REGULATIONS

In exercise of the power conferred under Sections 61 and 86 read with Section 181 of the Electricity Act, 2003, the Andhra Pradesh Electricity Regulatory Commission made the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff determination for Wind Energy Power Projects) Regulations, 2015. Regulation 1(2) thereof stipulates that these Regulations shall come into force from the date of

their publication in the official Gazette and, unless reviewed earlier or extended by the Commission, shall remain in force up to 31st March 2020. Regulation 2(d) defines *'CERC RE Tariff Regulations'* to mean the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012, as amended from time to time. Regulation 2(f) defines *'Control period'* to mean the period during which the norms for determination of tariff specified in these regulations shall remain valid. Regulation 2(o) defines *'Tariff Period'* to mean the period for which tariff is to be determined by the Commission on the basis of norms specified in these Regulations. Regulation 2(p) defines *'Useful Life'* in relation to a wind power project to mean Twenty Five years from the date of commercial operation (COD).

Regulation 3 of the 2015 Regulations relates to the scope and extent of application, and stipulates that these Regulations shall apply to wind power projects to be commissioned within the State of Andhra Pradesh for generation and sale of electricity, wholly or partly, to the distribution licensees within the State of Andhra Pradesh subsequent to the date of notification of these Regulations and where tariff for a generating station or a unit thereof, based on wind energy source, is to be determined by the Commission under Section 62 read with Section 86 of the Electricity Act, 2003.

Chapter 1 of the 2015 Regulations contains the General principles. Regulation 4, there-under, relates to *'Control Period'* and stipulates that the Control Period under these Regulations ends by 31st March 2020; the first year of the Control Period shall commence from the date of notification of these Regulations, and shall cover upto the end of the financial year 2015-16. Under the proviso thereto, the tariff determined as per these Regulations, for the wind power projects commissioned during the Control

Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 5.

Regulation 5 of the 2015 Regulations relates to the Tariff Period. Regulation 5(a) stipulates that the tariff period for wind power projects shall be equal to the useful life of the projects as defined under Regulation 2(p). Regulation 5(b) stipulates that the Tariff period, under these Regulations, shall be considered from the date of commercial operation of the wind power projects. Regulation 6 relates to proceedings for determination of tariff, and stipulates that the Commission shall notify the generic preferential tariff on suo-motu basis at the beginning of each year of the Tariff Period for wind power projects for which norms have been specified under these Regulations. The proviso thereto provides that, for FY 2015-16, the generic preferential tariff, on suo-motu basis, shall be notified soon after publication of the Regulations in the Official Gazette to be applicable with effect from the date of these Regulations coming into force.

Regulation 7 relates to the Tariff Structure, and stipulates that the tariff for wind power projects shall be a single part tariff consisting of the following cost components: (a) Return on equity, (b) interest on loan capital; (c) depreciation; (d) interest on working capital, and, (e) operation and maintenance expenses. Regulation 8 relates to levelized tariff, and stipulates that levelized tariff is calculated by carrying out levelization for the 'useful life' considering the discount factor for time value of money. Regulation 20 relates to subsidy or incentive by the Government, and read thus:

> *"The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation (AD) benefit, if availed by the*

generating company, for the Wind Power Projects while determining the tariff under these Regulations.

Provided that the following principles shall be considered for ascertaining income tax benefit on account of accelerated depreciation, if availed, for the purpose of tariff determination:
a) Assessment of benefit shall be based on normative capital cost, accelerated depreciation, rate as per relevant provisions under the Income Tax Act and Corporate Income Tax Rate.
b) Capitalization of Wind Power Projects during second half of the fiscal year. Per unit levellized accelerated depreciation benefit has to be computed considering the post-tax weighted average cost of capital as discount factor (as explained in Regulation 8).”

Regulation 27(ii) relates to the Model PPAs, and stipulates that the model Power Purchase Agreements, earlier approved by the Commission, shall be applicable to all wind power projects established since these regulations came into force and to the extent they are in consonance with these regulations.

VI. GENERIC TARIFF ORDERS

Pursuant to Regulation 6 of the 2015 Regulations, the APERC, by its suo-motu order No. 03 of 2015 dated 01.08.2015, stipulated the generic preferential tariff applicable from 31st July 2015 till 31st March 2016 in respect of Wind Power Projects in the State of Andhra Pradesh. The said generic tariff order records that the parameters taken into consideration, as per the 2015 Regulations, for determination of tariff. The tariff period was taken as 25 years and the useful life was also taken as 25 years. The said order thereafter records that, based on the above parameters and considering the useful life of the Wind Power Plants as 25 years, the

levelised generic preferential tariff worked out to Rs.4.84/ unit without considering accelerated depreciation, and Rs.4.25 with accelerated depreciation. The said order concludes stating that this tariff shall be applicable for all the new wind power projects entering into Power Purchase Agreements (PPA) on or after the date of notification of the 2015 Regulations in the Official Gazette of the Govt. of Andhra Pradesh i.e. from 31.07.2015.

Thereafter, the APERC passed another order, in suo-motu OP No. 13 of 2016 on 26.03.2016, notifying the generic preferential tariff applicable from 01.04.2016 to 31.03.2017 in respect of Wind Power Projects in the State of Andhra Pradesh pursuant to Regulation 6 of the 2015 Regulations. The said generic tariff order records that, as per Regulation 6 of the 2015 Regulations, the Commission is required to notify the generic preferential tariff on suo-motu basis at the beginning of each year of the tariff period for wind power projects for which norms have been specified under the Regulations.

The parameters taken into consideration, as per the 2015 Regulations, for determination of tariff are then detailed in the form of a table. The tariff period stipulated is 25 years, and the useful life is also stipulated as 25 years. Based on the said parameters, and considering the useful life of the wind power plant as 25 years, the levelised generic preferential tariff worked out to Rs.4.84 per unit without considering Accelerated Depreciation, and Rs.4.25 per unit with Accelerated Depreciation. The suo-motu generic tariff order dated 26.03.2016 concludes stating that the said tariff shall be applicable for all new wind power projects entering into PPAs with the AP Discoms on or after 01.04.2016.

VII. POWER PURCHASE AGREEMENT

The Appellant entered into the Power Purchase Agreement with the Respondent Discom on 18.02.2017. Article 2 of the said PPA relates to purchase of delivered energy and tariff. Clause 2.1 there-under stipulated that all the delivered energy, at the inter-connection point for sale to Discom, would be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the project, and the title to the delivered energy purchased should pass from the Wind Power Producer to the Discom at the inter-connection point. Clause 2.2 stipulates that the Wind Power Producer shall be paid tariff for energy delivered at the inter-connection point for sale to Discoms, which shall be firm at Rs.4.84 per unit without considering Accelerated Depreciation for a period of 25 years from the Commercial Operation Date (COD) as per APERC order dated 26.03.2016 in O.P. No. 13 of 2016.

Article 6 of the PPA relates to undertaking, and Article 6.1 stipulates that the Wind Power Producer shall be responsible for, among others, (xi) sharing of Clean Development Mechanism (CDM) benefits. Clause 6.1(xi) stipulates that the proceeds of carbon credit from approved CDM Project shall be shared between the generating company and concerned beneficiaries in the following manner: (a) 100% of the gross proceeds on account of CDM benefits is to be retained by the project developer in the first year after the date of commercial operation of the generating station; (b) in the second year, the share of the beneficiaries shall be 10% which shall be progressively increased by 10% every year till it reaches 50%, where after the proceeds shall be shared in equal proportion, by the generating company and the beneficiaries.

Article 7 of the PPA relates to duration of the agreement, and stipulates that the Agreement shall be effective upon its execution and delivery thereof between the parties, and shall continue in force from the Commercial Operation Date (COD) and until the twenty fifth (25^{th})

anniversary that is for a period of twenty five years from the Commercial Operation Date; this Agreement may be renewed for such further period of time, and on such terms and conditions as may be mutually agreed upon by the parties, 90 days prior to the expiry of the said period of twenty five years, subject to the consent of the APERC; and, any and all incentives/ conditions envisaged in the Articles of this Agreement, are subject to modification from time to time as per the directions of the APERC.

Article 11 of the PPA contains special provisions, and Article 11.2 stipulates that no oral or written modification of this Agreement, either before or after its execution, shall be of any force or effect unless such modification is in writing and signed by the duly authorized representatives of the Wind Power Producer and the DISCOM, subject to the condition that any further modification of the Agreement shall be done only with the prior approval of the APERC; however, the amendments to the Agreement, as per the respective orders of the APERC from time to time, shall be carried out.

VIII. ORDER IN OP NO. 5 OF 2017 DATED 13.07.2018:

OP No. 5 of 2017 was filed by the AP Discoms, under Regulation 55(1) and (2) of the 1999 Regulations requesting the Commission (i) to curtail the control period of the 2015 Regulations for the period valid up to 31.03.2017; (ii) to determine the tariff for FY 2017-18 considering the emerged facts stated in the petition and market discovered price and formulating appropriate parameters, in view of the issues stated in the petition and also the precarious financial position of the AP Discoms.

In its order in OP No. 5 of 2015 dated 13.07.2018 the Commission opined that the prayer of the AP Discoms to curtail the 2015 Regulations upto 31-03-2017 was valid, correct and was accepted as it was in the interest of the consumers who ultimately bear the power generic wind tariff

or any tariff determined under Section 62 by the Commission; the wind power generators who had set up wind power projects in the State of Andhra Pradesh had no reason to fear that their financial interest would be adversely effected if the 2015 Regulations was curtailed upto 31.03.2017. The 2015 Regulations was, accordingly, curtailed upto 31.03.2017 by the Commission in exercise of the powers conferred on it under Section 181 read with Section 61, 62 and 86(1)(b) of the Electricity Act and Clause 15 of the 2015 Regulations.

In its order dated 30.03.2017 in OP No.5 of 2017 (issued suo motu computing generic tariff for wind power projects), the Commission held that the 2015 Regulations stood nullified with effect from 01.04.2017, meaning thereby that it ceased to exist in the eye of law from that date; however, the 2015 Regulations would continue to be applicable to all PPAs which were entered into upto 31.03.2017, and approved by the Commission; any PPAs entered into after 31.03.2017 would be subject to determination of project specific wind tariff by taking all relevant factors and on the merits of each case.

The Commission concluded holding that the 2015 Regulations continued to apply for wind energy projects with whom Discoms of AP had entered into PPAs upto 31.03.2017 and were approved by the Commission; consequently, the order of the Commission in OP No. 15 of 2017 (issued suo motu) dated 30.03.2017 stood nullified with effect from 01.04.2017, ie it ceased to exist in the eyes of law from that date; any Power Purchase Agreement entered into by Discoms after 01.04.2017 shall be processed by the Commission on merits of each case, and the tariff will be determined for the period 01.04.2017 to 31.03.2020 under Section 61 and 62 of the Act.

The APERC directed that (a) In exercise of the powers conferred on the Commission by Section 181 of the Electricity Act, 2003, Section 54 of the Andhra Pradesh Electricity Reform Act, 1998 and clause 1 (2) of the

Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015, it is hereby declared that the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulations, 2015, shall be deemed to have remained in force upto 31-03-2017 and shall be deemed to have ceased to be in force with effect from 01-04-2017; (b) the petitioners are at liberty to procure power through a transparent process of bidding in accordance with the guidelines for tariff based competitive bidding process for procurement of power from grid connected wind power projects formulated and issued by the Ministry of Power, Government of India dated 08-12-2017 under Section 63 of the Electricity Act, 2003; (c) the petitioners were also at liberty to procure power from wind power projects in accordance with Sections 61, 62, 64 and 86 (1) (b) of the Electricity Act, 2003, and Sections 21 and 26 of the Andhra Pradesh Electricity Reform Act, 1998 and the rules, regulations, practice directions and orders issued there under until an appropriate regulation in that behalf is made by this Commission and any Power Purchase Agreement or tariff there under for such procurement shall be guided by the principles contained in the provisions of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017;(d) the order of the Commission dated 13-12-2017 in the matter of 41 Power Purchase Agreements between Southern Power Distribution Company of Andhra Pradesh Limited and various wind power developers and the order of the Commission in O.P.No.15 of 2017 dated 30-03-2017 shall be subject to this order as already stated in the said two orders respectively; and (e) this operative portion of this order shall be notified and published in the official Gazette of the State of Andhra Pradesh.

IX. CONTENTS OF THE IMPUGNED ORDER IN BRIEF:

O.P.No.1 of 2917 was filed by the Southern Power Distribution Company of India Ltd on 14.02.2017, under Regulation 55 (2) & (3) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, to amend the wind generation tariff orders dated 01-08-2015 and 26-03-2016 in order to pass on the GBI (Generation Based Incentives) amounts to the Andhra Pradesh Distribution Companies in compliance with clause 20 of the 2015 Regulations, and other appropriate orders.

In its order in O.P.No.1 of 2017 dated 28-07-2018, the APERC observed that the point for consideration was whether the Generation Based Incentive, received by different wind power generators under the scheme of the Government of India, had to be factored in determining the tariff for wind power projects in accordance with clause 20 of the 2015 Regulations, and whether the orders dated 01-08-2015 and 26-03-2016, notifying the generic preferential tariff in respect of wind power projects in the State, should accordingly give effect to the same ?.

After taking note of the 2015 Regulations, and the relevant statutory provisions, the APERC observed that the power to review the Regulations, earlier to 31-03-2020 till which date the Regulations would otherwise be in force, was retained by the Commission by clause 1(2) of the said Regulations; clause 6 directed the Commission to notify generic preferential tariff on *suo motu* basis at the beginning of each financial year; the tariff structure under clause 7 consisted of return on equity, interest on loan capital, depreciation, interest on working capital and operation and maintenance expenses; clause 20 specifically provided that the Commission shall take into consideration any incentive or subsidy offered by the Central or State Government including Accelerated Depreciation benefit, if availed by the generating company, for the wind power projects, while determining the tariff under the

Regulations; the direction to the Commission by clause 20 that it shall take into consideration any subsidy or incentive availed obviously means, on a purposive and harmonious construction and interpretation of all the relevant clauses put together, that, from out of the tariff under clause 7 or the levellized tariff under clause 8 consisting of the specific cost components and factors, the benefit received by availing any subsidy or incentive from any Central or State Government shall have to be given credit to in the final determination of tariff or levellized tariff; the words incentive and subsidy were not subjected to any restrictions or limitations in effect or substance or meaning; clause 22 of the Regulations provides that, for reasons recorded in writing, the tariff for sale of electricity by the wind power projects may be determined in deviation from the norms specified in the Regulations; clause 23 provides for the power, for reasons to be recorded in writing, to relax any of the provisions of the Regulations by the Commission *suo motu* or on an application, while issue of orders and practice directions for implementation of the Regulations is the subject of clause 24; the Commission has the power to remove difficulties by a general or specific order under clause 26; these clauses thus show that any deviation from or relaxation of the provisions of the Regulation is permissible for the reasons recorded in writing, and the incidental and ancillary power to give appropriate and required effect to the Regulations rests with the Commission under clauses 24 and 26 as well as clause 25 under which the Commission may vary or alter or modify or amend any provisions of the Regulations; deducting any incentive or subsidy, availed by a wind generator, from the cost components, and factors under clause 7 and / or clause 8 is what the Regulations have unambiguously prescribed, and any conceivable difficulty or problem in such interpretation can be overcome by taking recourse to clauses 22 to

26 of the 2015 Regulations together to the extent each of the clauses may apply.

The APERC held that, from the tariff orders dated 01-08-2015 and 26-03-2016, it was seen that Generation Based Incentive was not taken into account in the determination of the tariff for a part of the financial year 2015-16 (from 31-07-2015 to 31-03-2016), and the whole financial year 2016-17; the parameters, given in the Regulations, were computed as per Regulations to arrive at generic preferential tariff in both the orders; and tariff was fixed for both without Accelerated Depreciation benefit and with Accelerated Depreciation benefit; the benefit of no other subsidy or incentive was referred or taken into account and no reasons were mentioned for such a course of action; in the tariff orders dated 01-08-2015 and 26-03-2016, the benefit of Accelerated Depreciation was deducted from the tariff when availed, while the benefit of GBI was not deducted whether availed or un- availed, thus giving an additional benefit of Rs.0.50 ps per unit over and above the tariff without Accelerated Depreciation benefit; when Accelerated Depreciation and Generation Based Incentive are mutually exclusive, even according to the scheme of the Government of India, the purpose of both being the same to incentivize renewable power generation through wind, such unilateral advantage to those who opt for the GBI scheme in contrast with those who opt for Accelerated Depreciation benefit cannot be considered fair or reasonable, just or equitable, or based on any reasonable classification based on intelligible criteria; such a differential treatment to similarly or identically placed wind generators may be offending the fundamental right of equality before law and equal protection of laws; and the norms of this well settled principle should therefore lead to the wind generators availing wind generation based incentives in not claiming them or if availed, refunding the said benefits to the distribution companies reducing

the tariff payable by the distribution licensee to the extent of such Generation Based Incentive.

The APERC then observed that non-availability of inherent powers to the Commission, under clause 55 (2) and (3) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the petition being one for review under clause 49 of the said Regulations being barred by time, the tariff orders dated 01-08-2015 and 26-03-2016 having worked themselves out due to efflux of time not being reviewable, retrospective fixation of tariff being impermissible, the wind tariff orders having become final in the absence of any challenge, clause 20 of the 2015 Regulations prescribing only consideration of any incentive or subsidy but not its incorporation or deduction, revisiting the tariff being prohibited to curtail the incentives for nonconventional energy projects, the terms and conditions of a Power Purchase Agreement being unalterable except through mutual consent, the applicability of the doctrines of *promissory estoppel* and *legitimate expectation*, the Generation Based incentive Scheme categorically specifying the incentives to be over and above the tariff, the absence of any error apparent on the face of the record in the wind tariff orders to permit any review, the Commission having become *functus officio* after tariff determination, the absence of any power to the Commission to annul clause 4.6 of the Generation Based Incentive Scheme, Generation Based Incentive not being considered as pass through in spite of the letter of the petitioners dated 30-10-2015, the Generation Based Incentive Scheme being one in exercise of constitutional executive power of the Central Government which is coextensive and coterminous with the legislative power of the Parliament funded from the consolidated fund of the Government of India under Parliamentary approval and supervision etc., were the various grounds raised by the respondents and other objectors

against the reliefs prayed for by the petitioners with reference to clause 20 of the 2015 Regulations on the ground that the wind tariff orders dated 01-08-2015 and 26-03-2016 did not factor in the Generation Based Incentive in violation of clause 20.

The APERC observed that the wind tariff orders dated 01-08-2015 and 26-03-2016 made no reference to the Generation Based Incentive; there was no conscious application of mind to the issue of factoring in the Generation Based Incentive into the generic tariff, in fixing the tariff on both the occasions taking into account of the parameters prescribed by the Regulations; both the wind tariff orders did not consider the earlier letter from the petitioners dated 30-10-2015; the response of the Commission, in its letter dated 15-02-2016, was an answer to the request by the petitioners for making amendments to the 2015 Regulations observing that the efficacy or otherwise of the Regulation brought into force only on 31-07-2015 needs to be observed for a reasonably sufficient period of time, and the request to factor in Generation Based Incentive was neither looked into nor considered specifically; the same cannot be construed either as implied acceptance or implied rejection of the request; similarly the orders dated 01-08-2015 and 26-03-2016 also were *suo motu* made by the Commission only with reference to the parameters for fixation of tariff laid down in the 2015 Regulations, but with reference to no other factor or circumstance; and accelerated Depreciation benefit was considered and factored into the tariff due to clause 20 specifically referring to the same, while any Generation Based Incentive or any other incentive or subsidy did not attract the attention of the Commission in the absence of any specification or any stakeholder bringing them specifically to its notice during that period.

After referring to **Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited and others**: **(2009) 6 Supreme Court Cases 235,** and **Tata Power Vs Maharashtra Electricity Regulatory Commission 2009 ELR (SC) 0246,** the APERC held that, in exercise of its regulatory function, the Commission's jurisdiction to undertake a revision of the tariff in public interest remains intact; even if clauses 55 (2) and (3) of the Procedural Regulations of 1999, referring to the inherent powers of the Commission were to be considered of no direct application, still the mere mention of a wrong or incorrect provision of law will not divest the Commission of its jurisdiction, if it otherwise has such jurisdiction; in fact, the relief sought for by the petitioners was neither an amendment nor a review of the tariff orders dated 01-08-2015 and 26-03-2016, but it was only seeking a further order supplementing the original order by taking into consideration the Generation Based Incentive also in determining the tariff which was not considered earlier; and any period of limitation prescribed by clause 49 of the Procedural Regulations hence had no relevance.

The APERC held that the Generation Based Incentive scheme of the Government of India did not trace the scheme to any exercise of power by the Government of India under the Electricity Act, 2003, or any rule or regulation made there-under or any other enabling statute or statutory rule or statutory regulation; it was a scheme formulated and brought into force in exercise of the administrative power of the Government of India; if determination of tariff under the 2015 Regulations was within the statutory and administrative jurisdiction of the State Commission, by an executive or administrative scheme of the Government of India, the subordinate legislation made under the 2015 Regulations cannot be overruled; the administrative scheme has to be

considered as subject to the statutory regulations; when clause 20 of the 2015 Regulations makes no exception in respect of any subsidy or incentive in general, or Generation Based Incentive under Generation Based Incentive Scheme in particular, any mention in clause 4.6 of the scheme regarding Generation Based Incentive, being over and above any tariff determined by any State Commission, cannot override clause 20 of the 2015 Regulations; consequently, the Generation Based Incentive also has to be taken into consideration in determining the tariff on the plain and unambiguous language of clause 20; the words *'shall be taken into consideration'* is to be interpreted as making such incentive or subsidy being given credit to in the generic preferential tariff arrived at, and the Generation Based Incentive should hence be appropriately deducted from such tariff; while recovery of the full cost for generation by the developers is ensured in the manner of determination of tariff on the parameters prescribed by the 2015 Regulations, allowing any Generation Based Incentive to be retained, while not allowing any Accelerated Depreciation benefit to be not retained, will amount to unjust discrimination, irrational classification and unreasonable categorization of wind power generators similarly and identically situated; that apart, when the determination of tariff under the 2015 Regulations is based on the principle of full cost recovery of generation for the generator, allowing any Generation Based Incentive to be retained in addition will be promoting unjust enrichment, and not preserving the right to a reasonable return on equity; the petitioners cannot be considered to be prevented by any acquiescence in making the claim to the GBI amounts as the gap of time between the tariff order dated 01-08-2015 and Discoms' letter dated 30-10-2015 cannot be considered to be so wide as to erase the rights of the distribution licensees due to any implied acquiescence; in **Shree Shidbali Steels Limited: AIR 2011 SC 1175,** the Supreme Court held that there can be no estoppel against the

statute in withdrawal of a statutory notification as an exemption can be taken away under the very power under which it was granted; if any *promissory estoppel* or similarly any *legitimate expectation* do not come into play, then, as held in **Indian Thermal Power Limited Vs State of Madhya Pradesh and others: 2000 (1) SCR 925,** larger public interest should be the governing consideration in determination of the tariff; there is nothing irregular or strange in the wind power generators receiving the Generation Based Incentive giving the details of the amounts received by them towards such incentive which can be charged from the monthly bills of the developers if Generation Based Incentive is considered to be such as to be factored into the tariff under clause 20 of the 2015 Regulations which is the conclusion of the Commission herein; such course of action has become necessary as it was not factored into the tariff in the earlier tariff orders unlike the Accelerated Depreciation benefit; this petition has been filed before this Commission on 14-02-2017; if clause 20 of the 2015 Regulations makes it mandatory that such incentive should be taken into consideration, and it is not so taken into account so far, it is infringement of a provision in a subordinate legislation having statutory force and has to be corrected; the 2015 Regulations came into force with effect from 31-07-2015, the date of its publication in the official Gazette, and as such questions of limitation under the general law of limitation under the Limitation Act, 1963 or otherwise did not arise to disable the distribution licensee to recover any such amount to which they were entitled in accordance with law; while the petitioners were not estopped by their conduct from seeking the reliefs herein, the question of any review or amendment to the earlier tariff orders did not arise in granting the reliefs which only amount to giving effect to clause 20 of the 2015 Regulations in respect of the Generation Based Incentive which no way interfered with the determination of tariff earlier, except making such tariffs subject to the

Generation Based Incentive being factored into it; while the jurisdiction of the Commission, to consider this petition was traceable to specific provisions of the Electricity Act, 2003 or to the 2015 Regulations, the availability of any inherent powers etc., under any enabling provisions, will be of a peripheral effect and needs no further probe; the financial implications to the Discoms or the generators are not relevant factors vis-à-vis legal rights and obligations of the parties under law and, even if such economic consequences have to be taken into account, while the generators are already recovering the full cost of generation therefore through the tariff determined under the 2015 Regulations, the factoring in of the Generation Based Incentive into it will only help the public utilities that is Discoms in further serving larger consumer interest with the breathing space provided by making such significant sum available to them in accordance with the statutory regulations; and public interest should prevail over private interest is the accepted principle in such cases.

The APERC further held that the reliefs sought for were to give effect to the 2015 Regulations; it is well settled that mere mention of a wrong provision of law will not disentitle a party to a relief, if it is otherwise entitled to it; if clause 55 (2) and (3) of the Conduct of Business Regulations, 1999 were to be considered as only strengthening the specific provisions under which tariff determination can be made by the Commission, no such wrong also need be presumed; that the power to determine the tariff includes power to vary, modify, alter and amend or appropriately mould the tariff in accordance with law cannot be in dispute; the tariff orders dated 01-08-2015 and 26-03-2016 have become final in the absence of any challenge by any stakeholder, but what is sought for herein is to factor in the GBI into the tariff which was not the subject of consideration in the earlier tariff orders; omission by the Commission to

consider the same being now found to be in violation of clause 20 of the 2015 Regulations; if revision of tariff is admittedly within the jurisdiction of the Commission, it will not tantamount to unsettling the earlier tariff orders or reopening any settled questions, but would only amount to taking into consideration facts and circumstances as mandated by law which ought to have been taken into consideration, but not taken into consideration; the principle that the Commission becomes a *functus officio* after determination of the tariff under the earlier orders can apply to the extent of matters considered and decided in the earlier tariff orders, but not matters which were not considered and decided; the Commission cannot be considered to have applied its mind to the issue and decided it on merits or in its discretion, to exclude the Generation Based Incentive from consideration, without any such indication either in the proceedings leading to the making of the 2015 Regulations or the tariff orders dated 01-08-2015 and 26-03-2016; conscious and specific application of mind by the Commission to the issue of Generation Based Incentive cannot be a matter of presumption but of proof; while the 2015 Regulations provided for a single part levellized tariff for the tariff period, the said Regulation made under Section 61 is subject to the provisions of the Electricity Act, 2003, as stated in Section 61 itself; and Section 64 (6) provides for an amendment of a tariff or tariff orders; even otherwise, irrespective of the petitioners praying for the amendment of the tariff orders, what has been prayed for in effect and substance is giving effect to clause 20 of the 2015 Regulations without in any manner otherwise touching upon the determination of the tariff in the earlier orders of the Commission; while the Power Purchase Agreements between the distribution licensee and the wind power generators are undoubtedly legally enforceable contracts but in factoring in the Generation Based Incentive into the tariff, the same is only giving effect to a regulatory provision but not revisiting any

terms and conditions of the Power Purchase Agreements which bind the parties only to the tariff payable as per the 2015 Regulations; when clause 20 says 'any incentive', the words are wide enough to cover Generation Based Incentive also; the question whether any amendment to the regulation can only be prospective in nature is hence irrelevant, and *promissory estoppel* and *legitimate expectation* are equally extraneous for the present consideration; the claim that the subject tariff orders are beyond interference for 25 years, omits reference to the words 'unless amended or revoked' from Section 64 (6) of the Electricity Act, 2003; and the relief sought for is not interference with or substitution of any Government Policy by the Commission.

The APERC held that, in O.P.No.5 of 2017 on the file of this Commission orders on merits after contest were pronounced on 13-07-2018 declaring the 2015 Regulations to have ceased to be in force with effect from 01-04-2017; the result of O.P.No.5 of 2017 and this petition can and should be harmoniously given effect to; the Generation Based Incentive, if availed by a wind power generator under the scheme of the Government of India, had to be factored in the tariff determined under the 2015 Regulations under the orders in O.P.No.3 of 2015 dated 01-08-2015, and in O.P.No.13 of 2016 dated 26-03-2016; an inadvertent omission to give effect to clause 20 of the 2015 Regulations in the said two tariff orders by the Commission should not prejudice the petitioners in their right to enforce their legal right under the Regulations, and should not confer an unfair advantage to the wind power generators.

The petition was ordered accordingly in favour of the petitioners, appropriately moulding the relief in accordance with law; the Generation Based Incentive, claimed and availed by the wind power generators under the scheme of the Government of India, was directed

to be given credit to in the tariff determined for the wind power projects under the 2015 Regulations, by the orders of the Commission in O.P.No.3 of 2015 dated 01-08-2015, and in O.P.No.13 of 2016 dated 26-03-2016; and the petitioners were permitted to deduct the amounts so claimed and availed towards such Generation Based Incentive by any wind power generator, and only pay the balance of tariff payable to such wind power generator for the electricity supplied by such generator to the petitioners respectively out of the monthly bills payable since the filing of the petition on 14-02-2017 until such availed Generation Based Incentive was totally given credit to in the tariff payable by the petitioners to such generators respectively. The Original Petition was ordered accordingly.

X. DOES THE IMPUGNED ORDER RESULT IN UNILATERAL AMENDMENT OF THE CONCLUDED PPA?

A.SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Impugned Order has resulted in revision of the determined tariff which was fixed to be firm for a period of 25 years, and in unilateral amendment of the concluded PPA dated 18.02.2017 executed by the appellant with AP Discoms; the questions which arise for consideration are whether the APERC could have: (a) amended / revisited its Generic Tariff Order dated 26.03.2016 (for FY 2016-17) after the said order had attained finality, on the pretext that there was an inadvertent omission, in giving effect to Regulation 20 of the 2015 Regulations, while passing the Generic Tariff Order; and (b) unilaterally amended the concluded PPA to allow AP Discoms to retrospectively deduct GBI benefit from the appellant's Monthly bills / Tariff; and, since the parties are bound by the tariff incorporated in their PPA, the commission was not empowered to amend the PPA by way of the Impugned Order.

Reliance is placed on ***Ginni Global Ltd. v. Himachal Pradesh Electricity Regulatory Commission & Ors, 2022 SCC OnLine APTEL 124***

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

With respect to the Appellant's contention that, since the parties are bound by the tariff incorporated in their PPA, the commission was not empowered to amend the PPA by way of the Impugned Order, Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would submit that this plea has already been rejected by the Supreme Court **in *Tarini*;** even otherwise, Clause 2.2 of the PPA reveals that the parties incorporated the tariff as determined in the Generic Tariff Order, and in terms thereof; parties, which are sophisticated commercial entities, are presumed to know that a tariff determined under Section 62 of the Act is subject to amendments under Section 64(6) of the Act; the Appellant's submission that the tariff in the PPA is inviolable, is therefore misconceived; the Appellant's reliance on this Tribunal's judgment in ***Ginni Global Ltd. v. Himachal Pradesh Electricity Regulatory Commission & Ors, 2022 SCC OnLine APTEL 124*** ("**Ginni Global**") is misconceived; this Tribunal, in ***Ginni Global,*** was not concerned with a clause similar to clause 2.2; and prescription of tariff in clause 6.2 of the PPA in ***Ginni Global*** was without any reference to the tariff order, and was a consensual term.

Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would further submit that the relevant clause in ***Ginni Global,*** makes the said judgment inapplicable to the present case, as it was not subject to escalation or review as in the case of ***Tarini;*** in the present case, the plea of the Respondents- AP DISCOMs', to amend the General Tariff Order by OP No. 1 of 2017, was filed prior to execution of the PPA; in the Approval Order, the APERC specifically noted the pendency of OP 1 of 2017, and made the Approval

Order subject to the outcome of those proceedings; and, as this order has not been challenged, the Appellant must be held to have accepted the same.

C. JUDGEMENTS UNDER THIS HEAD:

(a). In **GUVNL vs. Tarini Infrastructure Ltd. & Ors.** (2016) 8 SCC 743, the Supreme Court held that Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission; determination of tariff is one of the primary functions of the Commission under Section 86, which determination includes a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s); the power of tariff determination/fixation is statutory (Refer: paras 36 and 64 of **A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34**); in the present case, the tariff incorporated in the PPA, between the generating company and the distribution licensee, is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers; in such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which cannot be altered except by mutual consent; rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved; and, under Section 64(6), a tariff order continues to remain in force for such period as may be specified.

The Supreme Court then observed that, currently in the State of Gujarat, the Gujarat Electricity Regulatory Commission (Multi-Year Tariff) Regulations, 2016 govern fixation of tariff by the State Commission; not only the tariff fixed is subject to periodic review, Regulation 31 provides for taking into consideration the force majeure events which is an uncontrollable factor; Regulation 23 provides that the approved aggregate

gain or loss, on account of uncontrollable factors, shall be passed through as an adjustment in the tariff over such period as may be specified in the order of the Commission; when the tariff order itself is subject to periodic review it is difficult to see how incorporation of a particular tariff prevailing on the date of commissioning of the power project can be understood to bind the power producer for the entire duration of the plant life (20 years) as has been envisaged by Clause 4.6 of the PPA in the case of Junagadh; in view of Section 86(1)(*b*), the Court must lean in favour of flexibility and not read inviolability in the terms of the PPA in so far as the tariff stipulated therein, as approved by the Commission, is concerned; It would be a sound principle of interpretation to confer such a power if public interest, dictated by the surrounding events and circumstances, require a review of the tariff; and the facts of the present case would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.

(b). In Ginni Global Ltd. v. Himachal Pradesh Electricity Regulatory Commission & Ors, 2022 SCC OnLine APTEL 124, this Tribunal held that, unlixke in **Tarini Infrastructure Limited** where the Supreme Court held that the Commission ought to have varied the tariff in the PPA in view of a change in the situation after the agreement was executed (ie shifting of the transmission line to a distance of 23 Kms instead of the originally envisaged 4 Kms, and the consequent provision of additional infrastructure costing around Rs. 10 crores, which was not envisaged in the concession agreement), the claim of the Appellant, in the present case, was for payment of 7,5% MAT rate which was in force prior to when the PPA was executed on 07.06.2004, despite which the Appellant had agreed to supply electricity to the second respondent at Rs. 2.50 per unit, which seemed to be the rate stipulated by the Govt of Himachal Pradesh in its policy dated 6.05.2000; not only did the Appellant

agree to the tariff rate of Rs. 2.50 per unit, they also agreed that this rate was firm and fixed without indexation and escalation, and shall not be changed for any reason whatsoever (Clause 6.2 of the PPA); and reliance placed, on behalf of the Appellant, on **Tarini Infrastructure Limited,** was, therefore, of no avail.

This Tribunal further observed that, while considering the earlier judgment in **GUVNL vsTarini Infrastructure Ltd: (2016) 8 SCC 743,** the Supreme Court, in **GUVNL vs Solar Semiconductor Power Company (India) Pvt. Limited, (2017) 16 SCC 498,** had observed that, In the facts and circumstances of that case, the tariff rate of Rs. 3.29 per kWh was subject to escalation, and subject to periodic review; evacuation was changed from a distance of 4 km to 23 km from its switchyard; on account of the same, Respondent 1 therein had incurred an additional cost of about Rs. 10 crores which was not envisaged in the Concession Agreement; and, in such facts and changed circumstances, the Supreme Court had thought it apposite to take a lenient view, and allow the State Commission to redetermine the tariff rate.

D.ANALYSIS:

On a conjoint reading of Clauses 5(a) and 8 of the 2015 Regulations, it is clear that the power conferred thereby on the Commission was to determine a levelized tariff under Section 62 of the Electricity Act, which tariff was to be applicable to wind power projects for the entire duration of its useful life of 25 years. It is in exercise of the power conferred by Regulation 6 of the 2015 Regulations that the APERC passed the generic tariff order, in OP No. 13 of 2016 dated 26.03.2016, determining the levelized generic preferential tariff at Rs. 4.84/kWh to prevail for the entire duration of the useful life of the wind power plants of 25 years.

By their earlier letter dated 30.10.2015, the Chairman, A.P. Power Co-ordination Committee (the procurer on behalf of AP Discoms) informed

the Secretary, APERC that the Commission had framed the 2015 Regulations to determine the tariff for Wind Power Projects in the State of Andhra Pradesh for FY 2015-16 to FY 2019-20 adopting the capital indexation mechanism; pursuant to the Regulations, the tariff for wind power projects was determined vide orders dated 01.08.2015 as Rs. 4.84 per unit (without AD benefit) and Rs. 4.25 per unit (with AD benefit).

The said letter, thereafter, details the submission of the Discoms/procurers of power for seeking amendment to the parameters specified in the 2015 Regulations. With respect to subsidy or incentive by the Government, it was submitted on behalf of the Discoms that the Commission may take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation (AD) benefit if availed by the generating company, for the wind energy power projects, while determining the tariff under these Regulations; the Commission had not taken into account the GBI provided by the Government of India @ Rs. 0.50 per unit while calculating the capital cost, and had also not considered the submissions of APPCC; in view of the fact that all reasonable costs and returns are being allowed to be recovered through such preferential tariff, it was fair that any subsidy, accelerated depreciation benefit or generation based incentive (which was a substitute for AD benefit) be factored in while determining tariff; and hence it was requested to amend the 2015 Regulations to pass on the GBI incentive to the distribution licensees.

In reply thereto, the Secretary, APERC, vide letter dated 15.02.2016, informed the Chairman, APPCC that the points brought to the notice of the Commission on 30.10.2015, with respect to the 2015 Regulations, had been noted by the Commission; in as much as the 2015 Regulations were notified only on 31.07.2015, its efficacy or otherwise needs to be observed for a reasonably sufficient period of time; and, thereafter, the Commission may take appropriate necessary action as deemed fit.

Clause 2.2 of the Power Purchase Agreement, executed by AP Discoms with the Appellant on 18.02.2017, reads thus:-

*"2.2 The Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at **Rs.4.84** per unit without considering Accelerated Depreciation for a period of 25 Years from the Commercial Operation Date (COD) as per APERC order dated 26.03.2016 in 0.P. No. 13 of 2016."*

Clause 2.2 of the subject PPA expressly stipulated that the wind power producer shall be paid a tariff which was firm at Rs. 4.84/kWh for a period of 25 years from the commercial operation date, and this was in terms of the APERC order in OP No. 13 of 2016 dated 26.03.2016.

Just over a month after the afore-said letter of the Commission dated 15.02.2016 was sent, the generic preferential tariff order was passed by the APERC in OP No. 13 of 2016 dated 26.03.2016. The said tariff order dated 26.03.2016 makes no reference to the GBI benefit. We find merit in the submission, urged on behalf of the Appellant, that the tariff determined by the said generic tariff order dated 26.03.2016 was in addition to the GBI benefit, of Rs.0.50 per unit, extended to wind power generators by the Government of India. Though the said generic tariff order does not explicitly so state, it does appear, (more so in the light of the afore-said correspondence which ensued in the interregnum and which clearly discloses that, though the GBI scheme was brought to its notice, the APERC chose not to amend the 2015 Regulations), that the APERC also understood the benefit extended to wind power generators under the GBI scheme to be over and above the tariff to be determined by it under Section 62 of the Electricity Act, 2003 read with the 2015 Regulations; and, as stipulated in the GBI Scheme itself, the GBI benefit extended by the Govt of India to wind power generators was over and above the tariff determined by the Commission.

Being fully aware that the levelized tariff, determined by APERC by its order in OP No. 13 of 2016 dated 26.03.2016 in terms of the 2015 Regulations, was to be paid by them to wind power generators, in addition to the GBI benefit of Rs. 0.50 per unit which they were entitled to receive from the Government of India, the AP Discoms proceeded to execute the PPA with the appellant on 18.02.2017, and in Clause 2.2 thereof expressly agreed to pay the appellant tariff at Rs. 4.84/kWh to be firm for a period of 25 years from the commercial operation date as per the APERC order in OP No. 13 of 2016 dated 26.03.2016.

Further the AP Discoms, without even informing the Appellant that they had filed OP No. 1 of 2017 before the APERC on 14.02.2017, seeking amendment of the generic tariff order in OP No. 13 of 2016 dated 26.03.2016, had entered into the subject PPA with the Appellant just four days thereafter on 18.02.2017. As the Appellant had executed the subject PPA with AP Discoms, in the belief that the tariff stipulated therein would be firm for a period of 25 years, the action of the AP Discoms in seeking reduction of the GBI benefit, extended to wind power generators by the Government of India, from the tariff stipulated in the generic tariff order dated 26.03.2016, and consequently in the subject PPA, may well amount to the AP Discoms seeking unilateral amendment of the concluded PPA.

The effect of the impugned order is to reduce the tariff from Rs. 4.84/kWh to Rs. 4.34/kWh, as a consequence of deducting the GBI of Rs.0.50 per unit from the tariff stipulated in the generic tariff order dated 26.03.2016, and consequently in the subject PPA dated 18.02.2017. While the action of the AP Discoms in executing a PPA on 18.02.2017 and in making them believe that the tariff stipulated therein was to be firm for a period of 25 years, without disclosing to the Appellant that they had filed OP No.1 of 2017 just four days prior thereto on 14.02.2017, does not show them in good light, we must also bear in mind that any PPA, executed by parties, must necessarily be aligned with the statutory regulations in force,

in view of the law declared by the Supreme Court, in **PTC India Ltd vs CERC; (2010) 4 SCC 603.** It is only if the generic tariff order dated 26.03.2016. (based on which the tariff was stipulated in the subject PPA), is held to fall foul of the 2015 Regulations, can it then be held that the APERC was justified in amending the generic tariff order dated 26.03.2016 to bring it in line with the 2015 Regulations.

As shall be detailed later in this order, the observations of the APERC in the approval order dated 13.12.2017, that the PPA would be subject to the result of OP No.1 of 2017, was merely an acknowledgement of the legal consequence of any proceedings pending adjudication before the Commission. A perusal of the approval order dated 13.12.2017, would make it clear that the AP Discoms had, in fact, earlier sought withdrawal of their petition seeking approval of the PPA, after having executed the PPA with the wind power generators, because of their financial constraints. There is merit in the submission, urged on behalf of the Appellant, that the repeated endeavor of AP Discoms, including the petition filed by them in OP No.1 of 2017, was only to overcome the financial difficulties they were facing.

Failure of the Appellants to challenge the order of the APERC dated 13.12.2017 matters little since, even if no such observations had been made therein, the consequence of pendency of OP No.1 of 2017 before the APERC, would only be that the PPA, which was executed four days after the OP was filed, would undoubtedly be subject to the result of OP No.1 of 2017. That, does not, by itself, justify reduction in the levelized tariff fixed in OP No.13 of 2016 dated 26.03.2016.

The relevant clause in the PPA in ***Ginni Global,*** read thus:-

"6.2 Tariff for net saleable energy The Board shall pay for the Net Saleable Energy delivered by the Company to the Board at the interconnection Point at a fixed rate of Rs. 2.50 (Rupees Two and paise

fifty) per Kilowatt hour. This rate is firm and fixed without indexation and escalation and shall not be changed due to any reason whatsoever".

It is true that Clause 6.2, of the PPA **in Gini Global,** not only states that the stipulated tariff was firm and fixed, but also that it shall not be changed due to any reason whatsoever. While Clause 2.2 of the subject PPA also states that the tariff stipulated therein would be firm for a period of 25 years from the commercial operation date as per the APERC order dated 26.03.2016 in OP No. 13 of 2016, it does not expressly state that the tariff shall not to be changed for whatever reason. This distinction in the language of the clauses in the PPAs in **Gini Global,** as compared to those in the subject PPA, is insignificant, for clause 2.2 of the subject PPA does not expressly state either that the tariff stipulated therein could be subject to change for any reason whatsoever; in any event, it is only if exercise of power by APERC, to amend the levelized tariff, in the generic preferential tariff order dated 26.03.2016, is held to legal and valid, can the tariff stipulated in the subject PPA be then held to be contrary to law.

The scope and ambit of Section 64(6) of the Electricity Act as well as Clause 20 of the 2015 Regulations, and whether the said provisions justify exercise of power by the State Commission to amend tariff orders, shall be examined later in this order. The question whether omission to deduct GBI, from the levelized tariff determined in OP No.13 of 2016 dated 26.03.2016, was merely an oversight or was a conscious decision taken by the APERC shall also be considered later in this order.

XI. DOES APERC HAVE THE POWER TO REVISE THE GENERIC TARIFF FIXED EARLIER FOR A PERIOD OF 25 YEARS?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In support of his submission that the APERC does not have the power to revise/revisit the tariff already fixed for 25 years, Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would

submit that exercise of jurisdiction by a statutory body, such as the APERC, can only be in terms of the statute; in tariff matters, the Electricity Act, 2003 confers power on the APERC to issue/notify regulations; Section 61 read with Sections 2(62), 181(1) and (2)(zd) of the Electricity Act are the sources of power to make Regulations; once Regulations are validly issued and notified, the Regulatory Commission can exercise jurisdiction only in terms of the said regulations; the Commission does not have any inherent or residuary power to do something which is not provided in the said regulations (the 2015 Regulations in the present case); this position has been upheld by the Supreme Court in ***PTC India Ltd v. CERC***; *(2010) 4 SCC 603;* the tariff, prescribed under the Generic Tariff Order dated 26.03.2016, was determined in terms of the 2015 Regulations; hence, the said tariff and the Generic Tariff Order will be governed by the 2015 Regulations; in the present case, neither the 2015 Regulations nor the Power Purchase Agreement ("**PPA**") dated 18.02.2017, executed between the parties, permit revision / amendment of the tariff once determined by the APERC; hence, APERC does not have any power to revisit the tariff determined under the Generic Tariff Orders dated 26.03.2016, which have been issued in terms of the 2015 Regulations. -

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would further submit that, in terms of the proviso to Regulation 4 and Regulation 5(a) read with Regulation 2(p) of the 2015 Regulations, the generic tariff determined by the APERC is firm and fixed for a period of 25 years; since the 2015 Regulations (which is applicable to all projects commissioned from 31.07.2015 till 31.03.2017) had not been amended, no order could have been passed revisiting the tariff determined under the said regulations; no tariff order or amendment thereof can be issued contrary to the regulations framed by the Commission; the tariff determined by the APERC has been incorporated in the Power Purchase

Agreement ("PPA") dated 18.02.2017, and the same cannot be overridden by way of an order passed by the APERC (***PTC India vs. CERC & Ors.*** *(2010) 4 SCC 603*); the Andhra Pradesh High Court (Division Bench), in ***Ecoren Energy India Private Ltd. & Ors. v. State of Andhra Pradesh & Ors,*** 2022 SCC OnLine AP 601, while dealing with an identical issue (i.e., amendment of tariff by the APERC post issuance of generic tariff order), and interpreting the same 2915 Regulations, has held that the APERC does not have the power to amend /revise the tariff, since the enabling regulation does not provide for periodic review of the tariff determined therein; the Andhra Pradesh High Court, in ***M/s Vayu Urja Bharat Pvt. Ltd. vs. APERC & Ors*** (Judgement in W.P. No. 29847 of 2018 and batch dated 23.08.2018 and 24.08.2018) (*challenging the same Impugned Order as appealed in the present case*) has also held that the APERC has no jurisdiction to exercise its powers to review the Generic Tariff Orders in the manner it has done in the Impugned Order; unlike the judgments relied upon by the APERC and AP Discoms, viz. ***GUVNL vs. Tarini Infrastructure Ltd. & Ors.*** *(2016) 8 SCC 743*; ***UPPCL vs. NTPC Ltd. & Ors.*** *(2009) 6 SCC 235; and* ***A.P. TRANSCO vs. Sai Renewable Power (P) Ltd.*** *(2011) 11 SCC 34*, the 2015 Regulations does not have any provision to revise/review the tariff that has already been determined; reliance on Section 62(4) is of no consequence, since tariff under Section 62 is determined in terms of the "provisions of the Act", which includes the Regulations; sanctity of the PPA must be maintained and the tariff, which has been incorporated in the PPA, cannot be unilaterally altered using inherent powers of the Commission; and, accordingly, once the PPA dated 18.02.2017 (incorporating the tariff determined in the Generic Tariff Order) had been executed, the APERC could not have unilaterally revised /revisited the tariff.

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would also submit that AP Discoms had filed the Petition (OP No. 01 of 2017) before the APERC seeking amendment of tariff under the inherent powers of the Commission; under the Electricity Act, the APERC neither had the jurisdiction nor the power to re-open / revise the terms of the concluded contracts (including tariff) by way of orders (Refer: (i) ***GUVNL vs. Solar Semi-Conductor Power Co (India) P. Ltd.*** *(2017) 16 SCC 498***;** (ii) ***M/s Ginni Global Ltd. vs. Himachal Pradesh ERC & Ors.*** (Order dated 15.12.2022 passed by Hon'ble Tribunal in Appeal No. 39 of 2018); (iii) ***Ecoren Energy India Pvt. Ltd. & Ors. v. State of Andhra Pradesh & Ors.,*** 2022 SCC OnLine AP 601 (involving the same parties and similar set of issues); (iv) ***Haryana Power Purchase Centre vs. Sasan Power,*** *(2024) 1 SCC 247***:** and ***Gujrat Urja Vikas Nigam Limited & Ors. V. Renew Wind Energy (Rajkot) Private Limited & Ors., 2023 SCC OnLine SC 411;*** PPAs can be re-opened only for the purpose of giving thrust to the renewable energy projects and not for curtailing the incentives (such as GBI); and even the judgement in ***GUVNL vs. Tarini Infrastructure Ltd. & Ors.*** *(2016) 8 SCC 743* enures to the benefit of a developer of a renewable energy project *albeit* for special reasons stated therein.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENTS:

Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would submit that the Appellant relies on the judgment of the Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Pvt. Ltd. & Anr: (2017) 16 SCC 498** ("**Gujarat Solar Semiconductor**") to contend that it is impermissible for the commission to amend the generic tariff order; this contention is also without basis for the reason that the Supreme Court, in **Gujarat Solar Semiconductor,** in fact reaffirmed the

commission's power to amend under Section 64(6) of the Act; the ratio of **Gujarat Solar Semiconductor** is limited to the extent that the Supreme Court disapproved the use of 'inherent powers' of the commission to do what is expressly provided for in Section 64(6) of the Act; consequently, the judgment in **Gujarat Solar Semiconductor,** in essence, fortifies the submission of the Respondent AP DISCOMs' that the Respondent Commission has statutory powers under Section 64(6) of the Electricity Act to amend a tariff order; a bare reading of the Impugned Order reveals that the Respondent Commission has, in fact, exercised powers under Section 64(6) of the Act, and prior thereto issued public notice; the Appellant has not assailed the Impugned Order on the basis that such a procedure was not followed; and, accordingly, reliance placed on **Gujarat Solar Semiconductor** would not advance the case of the Appellant.

C. JUDGEMENTS UNDER THIS HEAD:

(a). In **PTC India Ltd v. CERC; (2010) 4 SCC 603,** the Supreme Court held that determination of terms and conditions of tariff had been left to the domain of the Regulatory Commissions under Section 61 of the Act, whereas actual tariff determination by the Regulatory Commissions was covered by Section 62 of the Electricity Act; specifying the terms and conditions for determination of tariff was an exercise which was different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity; on a reading of Section 61 with Section 62 of the 2003 Act, it became clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act; on a reading of Section 62 with Section 64, it became clear that, although

tariff fixation like price fixation was legislative in character, the same under the Electricity Act was made appealable vide Section 111; and these provisions, namely, Sections 61, 62 and 64 indicated the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

In **PTC India vs. CERC & Ors. (2010) 4 SCC 603,** the Supreme Court further held that making of a regulation under Section 178 becomes necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities; a regulation under Section 178 is in the nature of a subordinate legislation; and such subordinate legislation can even override existing contracts including power purchase agreements which should be aligned with the regulations under Section 178. and which could not have been done across the board by an order of the Central Commission under Section 79(1)(*j*).

(b). In **Ecoren Energy India Private Ltd. & Ors. v. State of Andhra Pradesh & Ors,** 2022 SCC OnLine AP 601, the A.P.DISCOMs had filed O.P. No. 17 of 2019 before the APERC praying for the following reliefs: (i) to amend Regulation 01 of 2015 by specifying the reduced norms and parameters as follows: (a) Capacity Utilization Factor (CUF) : 26.5%, (b) Return on Equity (ROE) : 14%, (c) Loan Tenure : 13 years, (d) Interest on term loan : 9.23%, (e) Depreciation : 5.28% (13 years) (Remaining spread for the balance period considering 10% salvage value), and (f) Interest on Working Capital : 11.66%; (ii) to pass orders amending the Wind Power tariff determined vide orders dated : 01.08.2015 & 26.03.2016 respectively considering the amended norms and parameters in the regulation 01 of 2015; (iii) to pass orders effecting the reduced/amended tariff in the PPAs entered by APDISCOMs with the Wind Power generators, post issuance of Regulation 01 of 2015.

The above reliefs were claimed on the ground that most of the Wind projects, which were commissioned during the above said period, were using advanced technology machines with increased hug heights and rotor diameter for more efficiency, which was taken note of by the Commission in its RE Tariff Regulations, 2017 including dynamic changes in the market conditions and adopted reduced financial parameter values and also increase in the CUF due to better technology; the relevant tariff order of the concerned year taken by the Commission was applicable for the entire PPA period of 25 years resulting in long term unjustified burden on DISCOMs vis-à-vis end consumers; the Commission had taken cognizance of O.P. No. 17 of 2019 and issued public notice dated 06.02.2019, inter alia, mentioning that DISCOMs had filed a petition seeking to revise the tariff fixed for wind power projects pursuant to the 2015 Regulations; and the Commission had decided to conduct public hearing in this matter.

After referring to **Gujarat Urja Vikas Nigam Limited v. EMCO Limited**[16]**, Tarini Infrastructure Limited**, and **Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited** (wherein the Supreme Court had referred to the earlier judgments in **Gujarat Urja Vikas Nigam Limited v. EMCO Limited** and **Tarini Infrastructure Limited**), the Division Bench of the A.P. High Court, in **Ecoren Energy India Private Ltd. & Ors. v. State of Andhra Pradesh & Ors,** 2022 SCC OnLine AP 601, held that the legal position which emerged, on the basis of the above three judgments, was that the tariff once determined could be amended by the Regulatory Commission in exercise of the powers under Section 62(4) read with Section 64(6) and Section 86(1)(a) and (b); in **Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited**, the Supreme Court had considered the judgment in **Tarini Infrastructure Limited**, but

still proceeded to make an endeavour to analyse the case in the context of the factual matrix, and the relevant statutory provisions, to conclude that there cannot be any quarrel with regard to the power conferred on the Commission with regard to fixation of tariff for the electricity procured from the generating companies or amendment thereof in the given circumstances; and, similarly, the sanctity of PPAs had been highlighted therein, holding that the sanctity of PPAs, entered into between the parties by mutual consent, cannot be allowed to be breached by a decision of the State Commission, and that the terms of PPAs are binding on both the parties equally.

The Division Bench of the Andhra Pradesh High Court then examined the Power Purchase Agreement entered between the parties, and observed that the said PPA had also fixed the tariff in Article 2.2 for 25 years without mentioning that the same is subject to periodic review; Article 7 of the PPA dealt with duration of the Agreement specifically mentioning that the PPA shall continue in force for 25 years commencing from the date of commercial operation, and can be renewed for such period of time and on such terms and conditions as may be mutually agreed upon by the parties subject to consent of the APERC; Article 7 also mentioned that any and all incentives/conditions envisaged in the Articles of this Agreement were subject to modification from time to time as per the directions of the APERC; it did not, however, speak about modification of the tariff, but it only said about the incentives, and conditions; although clause 5 of the introductory part of the PPA provides that the terms and conditions of the agreement are subject to the provisions of the 2003 Act and the amendments made to the Act from time to time, and also subject to regulation by APERC, however, as observed by the Supreme Court, in **Tarini Infrastructure Limited**, there was no express condition in the PPA or in the Tariff Order that the same is subject to periodic review;

unless the Tariff Order itself is subject to periodic review, general recital in the agreement that the terms and conditions of the agreement are subject to modification from time to time as per the direction or subject to regulation by the APERC, would not clothe the APERC with the jurisdiction to retrospectively amend the Regulation/parameters so as to reduce the tariff.

The Division Bench of the Andhra Pradesh High Court further observed that the Commission, in its order in O.P. No. 5 of 2017 dated 13.07.2018, while curtailing the period of the Regulations, held that this Regulation will continue to be applicable to all PPAs which were entered into upto 31.03.2017 and approved by the Commission, with a further specific order that PPAs entered into after 31.03.2017 will be subject to determination of project specific wind tariff by taking into account all the relevant factors and on the merits of each case, meaning thereby, that the tariff fixed prior to 31.03.2017 under the parameters laid down in the 2015 Regulations shall continue to govern the PPAs entered into before the said date, but, thereafter, project specific wind tariff shall be binding on all future projects; thus, the Commission itself, on its judicial side, had passed the order binding the DISCOM to the tariff mentioned in the PPA, against which no appeal had been preferred by the Commission; the judgment rendered by the Supreme Court would thus operate in the context of specific terms of Regulations, and the Tariff Order which is completely distinguishable from the Regulations; the Tariff Order, PPAs and subsequent orders of the Commission in 41 PPAs case and O.P. No. 5 of 2017, in the case at hand, on the basis of factual matrix and the previous proceedings between the parties, it is not open for the Commission to amend the parameters to reduce the tariff which had already been made operative for 25 years by separate Tariff Orders, without mentioning that they are subject to periodic review; Ex consequenti, the prayer made in

O.P. No. 17 of 2019 was not maintainable; and, therefore, the proceedings in O.P. No. 17 of 2019 and O.P. No. 67 of 2019 on the file of the APERC deserved to be quashed.

(c). ORDER IN M/S. VAYU URJA BHARAT PRIVATED LIMITED VS. APERC:

Regulation 49 of the APERC (Conduct of Business) Regulations 1999 related to review of the decisions, directions and orders. Regulation 49 (1) of the 1999 Regulations stipulated that the Commission may on its own motion, or on the application of any of the person or parties concerned, within 90 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.

In its order, in **M/s. Vayu Urja Bharat Privated Limited vs. APERC (Order in IA No. 1 of 2018 in WP No. 29847 of 2018 dated 23.08.2018)**, the High Court at Hyderabad observed that, since the power to review its order under Regulation 49 of the 1999 Regulations is prohibited beyond 90 days, the Commission lacked jurisdiction to exercise the power of review, and to pass an order consequent thereto. This order was followed by a Division Bench of the High Court at Hyderabad in **M/s Renew Power Limited vs. APERC (IA No. 1 of 2018 in WP No. 30177 of 2018 dated 24.08.2018)** wherein it was observed that, until otherwise directed, the parties would stand governed by the interim order issued by the single judge in W.P. No. 29847 of 2018 dated 23.08.2018. The fact, however, remains that both the afore-said orders are interlocutory in character.

It is well settled that interlocutory orders have no finality and are, therefore, not binding as a precedent. There is no finality to an interlocutory order, and interim orders passed by Courts on certain conditions are not precedents. (**Empire Industries Limited v. Union of**

India : (1985) 3 SCC 314; M. Vijaya Kumar v. General Manager, Milk Products Factory, Andhra Pradesh Dairy Development Cooperative Federation Ltd. : (1990) 3 ALT 382).

(d). In **UPPCL vs. NTPC Ltd. & Ors. (2009) 6 SCC 235,** Regulation 103 of the 1999 Regulations expressly conferred power of review on the Central Commission; the Central Commission could not only exercise its jurisdiction suo motu but it may review a decision even if an application is filed within a period of sixty days of making of any decision, direction or order; Regulation 110 empowers the Central Commission to issue orders and practice directions in regard to the implementation of the Regulations and procedure to be followed and various matters which the Commission had been empowered by these Regulations to specify or direct; while exercising its power of review.

The Supreme Court held that, so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof; and its jurisdiction, in that sense, would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto; revision of a tariff must be distinguished from review of a tariff order; whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it; Regulations 92 and 94 did not restrict the power of the Central Commission to make additions or alterations in the tariff; making of a tariff was a continuous process; it could be amended or altered by the Central Commission, if any occasion arose therefor; the said power could be exercised not only on an application filed by the generating companies but by the Commission also on its own motion; PPA was a contract entered between GUVNL and the first respondent with clear

understanding of the terms of the contract; a contract, being a creation of both the parties, was to be interpreted having due regard to the actual terms settled between the parties; in the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers; merely because in the PPA, tariff rate as per Tariff Order, 2010 is incorporated, that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard; sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company, and to the disadvantage of the appellant; and the terms of PPA are binding on both the parties equally.

The Supreme Court further held that, in ***Gujarat Urja Vikas Nigam Ltd.* v. *Tarini Infrastructure Ltd.*, (2016) 8 SCC 743**, the Supreme Court was faced with the substantial question of law viz. whether the tariff fixed under a PPA (power purchase agreement) was sacrosanct and inviolable and beyond review and correction by the State Electricity Regulatory Commission; in that case, Respondent 1-power producer had entered into a PPA with the appellant distribution licensee for sale of electricity from the generating stations to the extent of the contracted quantity for a period of 35 years at Rs 3.29 per kWh subject to escalation of 3% per annum till date of commercial operation; however, later the power producer found that the place from where the power was to be evacuated was at a distance of 23 km as opposed to a distance of 4 km, envisaged in the concession agreement entered into between the respondent power

producer and Narmada Water Resources Department (Respondent 2 therein); on this ground, the respondent had sought revision of tariff by the State Electricity Commission; Section 86(1)(*b*) of the Act empowered the State Commission to regulate the price of sale and purchase of electricity between generating companies and distribution licensees through agreements for power, produced for distribution and supply, and that the State Commission has the power to redetermine the tariff rate when the tariff rate mentioned in the PPA between generating company and distribution licensee was fixed by the State Regulatory Commission in exercise of its statutory powers; in the facts and circumstances of that case, and that the tariff rate of Rs 3.29 per kWh was subject to escalation and subject to periodic review. evacuation was changed from a distance of 4 km to 23 km from its switchyard; on account of the same, Respondent 1 therein had incurred an additional cost of about Rs 10 crores which was not envisaged in the Concession Agreement; and, in such facts and changed circumstances, the Supreme Court thought it apposite to take a lenient view and allow the State Commission to redetermine the tariff rate.

The Supreme Court also held that. after taking into consideration the factors in Sections 61(*a*) to (*i*), the State Commission determined the tariff rate for various categories including solar power PV project and the same was applied uniformly throughout the State; when the said tariff rate, as determined by the Tariff Order, 2010, is incorporated in the PPA, it is a matter of contract between the parties; Respondent 1 was bound by the terms and conditions of the PPA entered into between Respondent 1 and the appellant by mutual consent, and the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date, and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties; and the claim of the respondent Corporation was not justified as the Central Commission

should not have been asked to revisit the tariff after five years and when everybody had arranged its affairs.

(e). In **A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34,** the Government of Andhra Pradesh had issued an Order dated 16-3-1996 according certain incentives in respect of the developers with whom NEDCAP had entered into a memorandum of understanding; a review of these incentives was taken after which GOMs No. 93 dated 18-11-1997 was issued, and it was decided to provide uniformity to all the projects based on renewable sources of energy; the Regulatory Commission had passed order dated 6-3-2000 giving certain directions including that the developers could sell the power generated by them to third party up to 17-11-2000; the rates were indicated, and that they would be reviewed with regard to purchase price with reference to each developer on completion of 10 years from the date of the commission of the project; after noticing various objections that had been raised by the developers it was stated that the Regulatory Commission was not attempting to stop any incentive, permitting non-conventional energy developers to make third-party sales would not be in the interest of organised growth of electricity industry, it would create discrimination between industrial consumers drawing power from non-conventional energy developers and the industrial consumers drawing power from APTRANSCO, these two would have to pay two different rates, and there will be undue enrichment of the developers as they were permitted to establish their generation plants with definite benefits which were carried out for years together; while holding that the Regulatory Commission had jurisdiction, it also noticed that the rates approved by the Regulatory Commission on the basis of guidelines issued by the Ministry of Non-Conventional Energy Sources were much higher than the rates

permitted by the State Government, and in comparison to other States they were favourable to the NCE developers.

This reasoning persuaded the Regulatory Commission to direct that, with effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms: (*i*) Power generated by non-conventional energy developers is not permitted for sale to third parties; (*ii*) Developers of non-conventional energy shall supply power generated to APTRANSCO/DISCOMS of A.P. only; (*iii*) Price applicable for the purchase by the supply licensee should be Rs. 2.25 per unit with 5% escalation per annum with 1994-1995 as the base year. APTRANSCO was simultaneously directed to arrange payment for the supply of power purchased from developers of non-conventional energy by opening a letter of credit in favour of the suppliers of power. A suo motu review of the incentives was to be undertaken by the Commission, as also a review of the purchase price with specific reference to each developer on completion of 10 years from the date of commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price was to be reworked on the basis of return on equity, O&M expenses and the variable cost. However, if any developer wishes to raise any specific issue with reference to this order, he will be entitled to apply to the Commission in the manner provided in the regulations."

After the Regulatory Commission passed the aforesaid order, the parties executed PPAs. These agreements were signed on the lines of the directives given in the order of the Regulatory Commission. It was stated that the agreements were required to be and were actually approved by the Regulatory Commission.

It is in this context that the Supreme Court observed that Sections 61 to 64 of the Electricity Act, 2003 place an obligation upon the appropriate

Commission to determine the tariff in accordance with the provisions of this Act; an application for determination of tariff shall be made by the generating company under Section 64 and the tariff has to be determined by the appropriate Commission; it is also required to specify the terms and conditions for determination of the tariff as per the factors and the guidelines specified under Section 61 of the Act; by order dated 20-6-2001 made in OP No. 1075 of 2000, the Regulatory Commission directed generators of non-conventional energy to supply power exclusively to APTRANSCO; the non-conventional energy developers were not permitted to sell the energy generated by them to third parties; by the same order the Regulatory Commission also approved the rate which was prevailing earlier for such supply at Rs. 2.25 per unit with 5% escalation per annum from 1994-1995 being the base year; while the Regulatory Commission undertook the review of prices in relation to sale of electricity by non-conventional energy developers, it specifically referred to the order in OP No. 1075 of 2000, which, in turn, provided for review of sale price and incentives given earlier to the said developers with effect from 1-4-2004; it also noticed that the PPAs signed by APTRANSCO and NCE developers included provisions for such review by the Regulatory Commission with effect from 1-4-2004; it took the view that review of the price at which APTRANSCO shall purchase power from the NCE developers is within the jurisdiction of the Regulatory Commission under Section 21(4) of the Reforms Act, 1998, and also under Section 86(1) of the Electricity Act, 2003; the PPAs between Transmission Corporation of Andhra Pradesh Ltd. and the developers were executed in May 1999 and some of the agreements even prior thereto; however, despite all the prevalent guidelines and G.Os., the Regulatory Commission passed an order on 20-6-2001 determining the tariff as well as defining other rights and obligations between the parties including that the generators were not permitted to make sale in favour of a third party; and, after the passing of

this order, the developers entered into PPAs between the period August 2001 to 2002 and confirmed the acceptance and implementation of the order of 20-6-2001.

The Supreme Court further observed that, while providing different clauses relating to various facets of sale and distribution of generated power, PPAs under Articles 2.1 and 2.2 contemplated specifically that the purchase of energy by APTRANSCO will be at the tariff provided under Article 2.2; Article 2.2 determined the rate at Rs. 2.25 per unit with escalation at 5% per annum with 1994-1995 as the base year which was to be revised on 1st April of every year up to the year 2003-2004, beyond which the purchase price by APTRANSCO would be decided by the Regulatory Commission; a further review of purchase price is contemplated on completion of 10 years from the date of commissioning of the project when it would be reworked; in other words, there were specific stipulations provided under the PPAs, as well as in the order dated 20-6-2001, for revision/review of purchase price; clause 2.3 further clearly said that tariff was inclusive of all taxes, duties and levies; in other words, all the documents provided for a review including the guidelines issued by the Government of India; these guidelines were general guidelines and every State was required to act as per its own needs, convenience and by taking a general view, as to which were the most practical and affordable projects and how they should be carried on by the State; all the PPAs, entered into by the generating companies with the appropriate body, as well as the orders issued by the State in GOMs Nos. 93 and 112, in turn, had provided for review of tariff and the conditions; the Tribunal had fallen in error of law in coming to the conclusion that the Regulatory Commission had no powers either in law or otherwise of reviewing the tariff and so-called incentives; every document on record referred to the power of the authority/Commission to take a review on all aspects including that of the tariff.

The Supreme Court then observed that, from the various provisions and the documents on record it was clear that the Regulatory Commission is vested with the power to revise tariff and conditions in relation to procurement of power from the generating companies; it is also clear from the record that in terms of the contract between the parties, APTRANSCO had reserved the right to revise tariff, etc. with the approval of the Regulatory Commission; in the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government, which the State Government accepted to consider, amend or alter as per their needs and conditions and then make efforts to achieve the objects of encouraging non-conventional energy generators and purchasers to enter into this field; these were the matters which squarely fell within the competence of the Regulatory Commission/the State Electricity Board at the relevant points of time; besides that, there was no definite and clear promise made by the authorities to the developers that would invoke the principle of promissory estoppel; to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided but these incentives under the guidelines, as well as under the PPAs signed between the parties from time to time, were subject to review; in any case, the matter was completely put at rest by the order of 20-6-2001 and the PPAs voluntarily signed by the parties at that time, which had also provided such stipulations; if such stipulations were not acceptable to the parties, they ought to have raised objections at that time or at least within a reasonable time thereafter; the agreements had not only been signed by the parties but they had been fully acted upon for a substantial period; in terms of various statutory provisions, the Regulatory Commission is entitled to determine the tariff; and they were unable to agree with the view taken by the Tribunal that the Regulatory Commission had no jurisdiction;

and that fixation of tariff did not include purchase price for buy-back of the generated power.

The Supreme Court also observed that the principle of promissory estoppel, even if it was applicable, the Government could still show that equity lay in favour of the Government, and can discharge the heavy burden placed on it; in such circumstances, the principle of promissory estoppel would not be enforced against the Government as it is primarily a principle of equity; once the ingredients of promissory estoppel are satisfied then it could be enforced against the authorities including the State with very few extraordinary exceptions to such enforcement; the law is more or less settled that where the Government makes a promise knowing or intending that it would be acted upon by the promise, and in fact the promisee has acted in reliance of it, the Government may be held to be bound by such promise; the doctrine of promissory estoppel is not really based on the principle of estoppel but is a doctrine evolved by equity in order to prevent injustice; there is no reason why it should be given only a limited application by way of defence; it can also be the basis of a cause of action; even if we assume that there was a kind of unequivocal promise or representation to the respondents, reviews have taken place only after the period specified under the guidelines and/or in the PPAs was over; this is a matter which, primarily, falls in the realm of contract and the parties would be governed by the agreements that they have signed; and, once these agreements are signed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel.

The Supreme Court held that, in the present case, the order dated 20-6-2001 was fully accepted by the parties without any reservation; after lapse of more than reasonable time, and of their own accord, they voluntarily signed the PPA which contained a specific stipulation

prohibiting sale of generated power by them to third parties; the agreement also had a renewal clause empowering TRANSCO/APTRANSCO/Board to revise the tariff; thus, the documents executed by these parties and their conduct of acting upon such agreements over a long period, bind them to the rights and obligations stated in the contract; the parties can hardly deny the facts as they existed at the relevant time, just because it may not be convenient now to adhere to those terms; conditions of a contract cannot be altered/avoided on presumptions or assumptions or the parties having a second thought that a term of contract may not be beneficial to them at a subsequent stage; they would have to abide by the existing facts, correctness of which, they can hardly deny; and, such conduct, would be hit by *allegans contraria non est audiendus*.

The Supreme Court observed that, in **Kusumam Hotels (P) Ltd. v. Kerala SEB: (2008) 13 SCC 213,** the Supreme Court declined to enforce the principle of promissory estoppel as there was no foundational facts and also indicated that the Government can alter, amend or rescind its policy decision in public interest; the law which emerged was that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor had been laid down in a case of this nature; the State, however, would be entitled to alter, amend or rescind its policy decision; such a policy decision, if taken in public interest, should be given effect to; in certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions; the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication; it is a principle of the rule of law; and a presumption can be raised that a statute or statutory rule has prospective operation only; the law of promissory estoppel has attained

certainty; it is only an unambiguous and definite promise, which is otherwise enforceable in law, upon which, the parties have acted, comes within the ambit and scope of enforcement of this principle and binding on the parties for their promise and representation; it will be difficult for the Court to hold that the guidelines can take the colour of a definite promise which in the letters of the Central Government itself were proposals to the State Government; besides that, even if we treat the State letters/circulars as promise or representations to the private parties like the respondents, even then, they led to the execution of a definite contract between the parties which will purely fall in the domain of contractual law; these contracts specifically provided for review and when reviewed in the year 2001 parties not only accepted the order but executed contracts (PPAs) in furtherance of it; in these circumstances, they were unable to accept the argument that the State or the Regulatory Commission or the erstwhile State Electricity Board were bound to allow the same tariff and permit third-party sales for an indefinite period; and to this extent, authorities, in any case, would not be bound by the principle of estoppel.

(f) In **GUVNL vs. Solar Semi-Conductor Power Co (India) P. Ltd.** (2017) 16 SCC 498, the Supreme Court observed that, in the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA); PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract; a contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties; as per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011; it is a complex fiscal decision consciously taken by the parties; in the contract involving rights of GUVNL and ultimately the rights of the

consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers; merely because in PPA, tariff rate, as per Tariff Order, 2010, is incorporated, that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard; sanctity of the PPA, entered into between the parties by mutual consent, cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company and disadvantage of the appellant; and the terms of PPA are binding on both the parties equally.

The Supreme Court further observed that, in **Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743,** the tariff rate of Rs 3.29 per kWh was subject to escalation and subject to periodic review; evacuation was changed from a distance of 4 km to 23 km from its switchyard; on account of the same, Respondent 1 therein had incurred an additional cost of about Rs 10 crores which was not envisaged in the Concession Agreement; and, in such facts and changed circumstances, the Supreme Court thought it apposite to take a lenient view and allow the State Commission to redetermine the tariff rate.

The Supreme Court also held that, in exercise of its statutory power, under Section 62 of the Electricity Act, the Commission fixes the tariff rate; after taking into consideration the factors in Sections 61(*a*) to (*i*), the State Commission determined the tariff rate for various categories including solar power PV project and the same is applied uniformly throughout the State; when the said tariff rate, as determined by the Tariff Order, 2010, is incorporated in the PPA between the parties, it is a matter of contract between the parties; Respondent 1 is bound by the terms and conditions

of PPA entered into between Respondent 1 and the appellant by mutual consent; and the State Commission was not right in exercising its inherent jurisdiction by extending the Tfirst control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties.

(g) In **Haryana Power Purchase Centre vs. Sasan Power, (2024) 1 SCC 247**, the Supreme Court held that the Tribunal cannot make a new bargain for the parties; the Tribunal cannot rewrite a contract solemnly entered into; it cannot ink a new agreement; such residuary powers to act which varies the written contract cannot be located in the power to regulate; the power cannot, at any rate, be exercised in the teeth of express provisions of the contract; in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract; while it may be open for a regulation to extricate a party from its contractual obligations, in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to *usurp* this power to disregard the terms of the contract.

(h) As the judgement of the Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Pvt. Ltd. & Anr: (2017) 16 SCC 498,** the judgement of the Division Bench of the Andhra Pradesh High Court, in **Ecoren Energy India Pvt. Ltd. & Ors. v. State of Andhra Pradesh & Ors.,** 2022 SCC OnLine AP 601, and of this Tribunal, in **M/s Ginni Global Ltd. vs. Himachal Pradesh ERC & Ors.** (Order of APTEL in Appeal No. 39 of 2018 dated 15.12.2022), have been referred to in great detail earlier in this order, they do not bear repetition.

D. ANALYSIS:

Regulation 2(p) of the 2015 Regulations defined ‘useful life’ in relation to wind power to mean 25 years from the date of Commercial Operation (COD), and Regulation 5(a) thereof stipulated that the tariff period for wind power project shall be equal to the useful life of the project as defined under Regulation 2(p). A conjoint reading of Regulation 2(p) and Regulation 5(a) of the 2015 Regulations makes it clear that the tariff period for wind power projects shall be equal to the useful life of the project ie for 25 years from the COD.

Regulation 6 of the 2015 Regulations related to proceedings for determination of tariff, and required the Commission to notify the generic preferential tariff on suo-motu basis at the beginning of each year of the Tariff Period for wind power projects for which norms had been specified under the 2015 Regulations. The proviso thereto stipulated that, for FY 2015-16, the generic preferential tariff on suo-motu basis shall be notified soon after the publication of the regulations in the official gazette to be applicable with effect from the date the Regulations came into force. Soon after the 2015 Regulations came into force on 31.07.2015, the APERC passed the generic preferential tariff Order No. 3 of 2015 dated 01.08.2015

While Regulation 7 of the 2015 Regulations gives details of the components of the tariff structure which, for a wind power project, is a single art tariff, Regulation 8 stipulated that the tariff was calculated by carrying out levelization for the ‘useful life’ considering the discount factor for time value of money. Consequently, the levelized tariff, as prescribed under the 2015 Regulations, is the tariff which would prevail for a period of 25 years from the date of COD.

It is in the afore-said circumstances that the generic tariff order, passed by the APERC in OP No. 3 of 2015 dated 01.08.2015 in

compliance with Sections 61(h) and 86(1)(e) of the Electricity Act and the 2015 Regulations, stipulated that in terms of the parameters taken into consideration in the 2015 Regulations, and considering the useful life of wind power plant as 25 years, the levelized generic preferential tariff worked out to Rs.4.84 per unit without considering accelerated depreciation and Rs.4.25 per unit with accelerated depreciation. The said tariff is the tariff which would apply to wind power generating plants for a period of 25 years from its COD. The generic tariff Order No. 3 of 2015 dated 01.08.2015, and the tariff stipulated therein, was applicable to all wind power projects for which the PPA was entered into on or after 31.07.2015 ie the date of notification of the 2015 Regulations. Subsequently, the APERC passed the suo-motu order in OP No. 13 of 2016 dated 26.03.2016 notifying the generic preferential tariff applicable from 01.04.2016 to 31.03.2017 in respect of wind power projects in the State of Andhra Pradesh.

The suo-motu order in OP No. 13 of 2016 dated 23.06.2013 records that, in terms of Regulation 6, the Commission shall notify the generic preferential tariff on suo-motu basis at the beginning of each year of the tariff period for the wind power projects for which norms have been specified under the 2015 Regulations. It, thereafter, records the parameters taken into consideration for determination of tariff, and then states that, based on the said parameters and considering the useful life of wind power plant as 25 years, the levelized generic preferential tariff worked out to Rs.4.84 per unit without considering the Accelerated Depreciation and Rs..4.25 per unit with Accelerated Depreciation; and the said tariff would be applicable for all new wind power projects entering into Power Purchase Agreements (PPA's) with AP Discoms on or after 01.04.2016. The subject PPA was executed on 18.02.2017 and, in terms of the suo-motu order in OP No. 13 of 2016 dated 23.06.2013, Clause 2.2

of the said PPA stipulated that the wind power producer shall be paid tariff for energy delivered, which shall be firmed at Rs.4.84 per unit without considering Accelerated Depreciation for a period of 25 years from the Commercial Operation Date (COD).

Among the functions which the State Regulatory Commission is required to discharge is, in terms of Section 86(1)(e), to promote generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and to specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. Section 61 requires the Appropriate Commission to specify, by way of regulations, the terms and conditions for determination of tariff. Section 61(h) requires it, while making such regulations, to be guided by the requirement to promote co-generation and generation of electricity from renewable sources of energy.

In the light of Section 61(h), and in the discharge of its functions under Section 86(1)(e) of the Electricity Act, 2003, the APERC exercised its powers under Section 181 of the Electricity Act, 2003 to make the APERC (Terms and Conditions for Tariff Determination for Wind Power Projects) Regulation, 2015. As is evident from Clause 3 thereof, the 2015 Regulations applies to cases where the tariff, for a generating station or unit thereof based on wind energy source is to be determined by the Commission under Section 62 read with Section 86 of the Electricity Act, 2003. The proviso to Regulation 4 makes it amply clear that the tariff determined under the 2015 Regulations, for wind power projects commissioned during the control period stipulated therein, shall continue to be applicable for the entire duration of the tariff period specified in Regulation 5 which, in terms of Regulation 5(a), is for the useful live of the project ie for 25 years. Regulation 6 obligated the Commission to notify,

on a *suo moto* basis, the generic preferential tariff at the beginning of each year of the tariff period for the wind power projects.

Consequently the generic preferential tariff determined by OP No.13 of 2016 dated 26.03.2016 was applicable, from 01.04.2016 to 31.03.2017, in respect of wind power projects in the State of Andhra Pradesh. The said tariff order also made it clear that the tariff stipulated therein was to be applicable to all new wind power projects entering into PPA with AP Discoms on or after 01.04.2016. The subject PPA, which was executed on 18.02.2017, was therefore governed by the generic preferential tariff stipulated in OP No. 13 of 2016 dated 26.03.2016, and the levelized tariff stipulated therein was to govern for the entire duration of the PPA of 25 years.

As shall be detailed later, the power to amend the tariff may be available to the Commission. It is, however, difficult to accept that such a power to amend can be exercised for the mere asking, more so in cases where the tariff determination exercise was undertaken in terms of the 2015 Regulations (which required a levelized tariff to be fixed for the entire useful life of the wind power project of 25 years), and in the discharge of the statutory functions of the Commission under Section 86(1)(e) of the Electricity Act, 2003 to promote generation of electricity from renewable sources of energy.

(i). CLAUSES 22 TO 26 OF THE 2015 REGULATIONS

As reference has been made in the impugned order to clause 22 to 26 of the 2015 Regulations, it is useful to consider its scope and ambit. Clause 22 of the 2015 Regulations relates to deviation from norms, and stipulates that the Tariff for sale of electricity by the Wind Power Project may also be determined in deviation from the norms specified in these Regulations, subject to the condition that the levelized tariff over the useful life of the project, on the basis of the norms in deviation, does not exceed

the levelized tariff calculated on the basis of the norms specified in these Regulations. Under the proviso thereto, the reasons for deviation from the norms, specified under these Regulations, shall be recorded in writing.

Clause 23 relates to the power to relax, and thereby the Commission may, by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected, relax any of the provisions of these Regulations on its own motion or on an application made before it by an interested person. Clause 24 relates to Issue of Orders and Practice Directions, and stipulates that, subject to the provisions of the Electricity Act, the AP Reforms Act, 1998 and the 2015 Regulations, the Commission may, from time to time, issue orders and practice directions in regard to the implementation of these Regulations, the procedure to be followed and other matters, which the Commission has been empowered by these Regulations to specify or direct.

Clause 25 relates to the power to amend, and enables the Commission, at any time, to vary, alter, modify or amend any provisions of these Regulations. Clause 26 relates to the power to remove difficulties, and thereunder, if any difficulty arises in giving effect to the provisions of these Regulations, the Commission may, by general or specific order, make such provisions not inconsistent with the provisions of the Electricity Act, as may appear to be necessary for removing the difficulty.

Since the APERC, in the impugned order, has not observed that it has either exercised its power to relax any of the provisions of the Regulations in terms of Clause 23, or to have issued any order or practice direction in regard to implementation of the 2015 Regulations in terms of Clause 24, or to have altered, modified or amended any of the provisions of the Regulations in exercise of its power under Clause 25, or to have exercised its power to remove difficulties by general or specific orders not

inconsistent with the provisions of the Act, in terms of Clause 26, a vague reference to Clauses 23 to 26 of the 2015 Regulations, in the impugned order, is of no consequence.

Clause 22 of the 2015 Regulations, which confers power on the Commission, in determining the levelized tariff over the useful life of the project, to deviate from the norms specified in the 2015 Regulations, places a fetter, on exercise of the said power, by stipulating that such determination should not exceed the levelized tariff calculated on the basis of the norms specified in the 2015 Regulations. In effect, the deviation can result in reduction of, but can in no case exceed, the levelized tariff calculated on the basis of the norms specified in the 2015 Regulations. Yet another restriction on the power to deviate is stipulated in the proviso to Clause 22, in terms of which the Commission is also required to record in writing the reasons for deviation from the norms. As the understanding of the APERC, as is reflected in the impugned order, is that Clause 20 of the 2015 Regulations mandates it to factor in GBI while determining the levelized tariff, clause 22 also has no application as, according to the APERC, it has not deviated from the norms stipulated in the 2015 Regulations.

(ii). In **Ecoren Energy India Private Ltd. & Ors. v. State of Andhra Pradesh & Ors,** 2022 SCC OnLine AP 601, (on which, as referred to hereinabove, reliance has been placed on behalf of the appellant), the reliefs sought by A.P.DISCOMs before the APERC were to amend the 2015 Regulations; to amend the Wind Power tariff determined vide orders dated 01.08.2015 & 26.03.2016; and to pass orders effecting the reduced/amended tariff in the PPAs entered by APDISCOMs with the Wind Power generators, post issuance of the 2015 Regulations. While GBI benefit was not the subject matter of the proceedings before the AP High Court in **Ecoren Energy India Private Ltd,** it is the very same 2015

Regulations, the Generic Tariff Order dated 26.03.2016, and the order of the APERC in O.P. No. 5 of 2017 dated 13.07.2018, all of which arose for consideration therein, which also arise for consideration in the present appeal. The terms and conditions of PPAs, in **Ecoren Energy India Private Ltd,** are also more or less identical to those in the subject PPA.

The Division Bench of the A.P. High Court, in **Ecoren Energy India Private Ltd**, held that the tariff once determined could be amended by the Regulatory Commission in exercise of the powers under Section 62(4) read with Section 64(6) and Section 86(1)(a) and (b); the Power Purchase Agreement entered between the parties had fixed the tariff in Article 2.2 for 25 years without mentioning that the same is subject to periodic review; Article 7 of the PPA specifically mentioned that the PPA shall continue in force for 25 years commencing from the date of commercial operations; Article 7 did not speak about modification of the tariff, but only referred to incentives and conditions; although clause 5 of the introductory part of the PPA provided that the terms and conditions of the agreement were subject to the provisions of the 2003 Act and the amendments made to the Act from time to time, and also subject to regulation by APERC, there was, however, no express condition in the PPA or in the Tariff Order that the same is subject to periodic review; unless the Tariff Order itself is subject to periodic review, general recital in the agreement that the terms and conditions of the agreement are subject to modification from time to time as per the direction or subject to regulation by the APERC, would not clothe the APERC with the jurisdiction to retrospectively amend the Regulation/parameters so as to reduce the tariff; the Commission, in its order in O.P. No. 5 of 2017 dated 13.07.2018, held that this Regulation will continue to be applicable to all PPAs which were entered into upto 31.03.2017 and approved by the Commission, meaning thereby, that the tariff fixed prior to 31.03.2017 under the parameters laid down in the 2015

Regulations shall continue to govern the PPAs entered into before the said date; thus, the Commission itself, on its judicial side, had passed the order binding the DISCOM to the tariff mentioned in the PPA, against which no appeal had been preferred by the Commission; in view of the Tariff Order, PPAs and subsequent orders of the Commission in 41 PPAs case and O.P. No. 5 of 2017, in the case at hand, on the basis of factual matrix and the previous proceedings between the parties, and it was not open for the Commission to amend the parameters to reduce the tariff which had already been made operative for 25 years by separate Tariff Orders, without mentioning that they are subject to periodic review.

The law declared by the Division Bench of the Andhra Pradesh High Court, in **Ecoren Energy India Private Ltd. & Ors. v. State of Andhra Pradesh & Ors,** 2022 SCC OnLine AP 601, is binding on this Tribunal. Following the law declared in the afore-said judgement it must be held that it was not open for the APERC to amend the parameters to reduce the tariff which had already been made operative for 25 years by separate Tariff Orders, as the subject PPA was also not subject to periodic review.

Suffice it to conclude, our observations under this head, holding that, save in exceptional circumstances and except on a clear case of infringement of the statutory regulations being established, the levelized tariff stipulated for a period of 25 years, by way of generic preferential tariff orders passed by the Commission, and pursuant to which RE generators have entered into PPAs with the distribution licensees and have acted upon and implemented the same, should, ordinarily, not be amended or varied.

XII. ORDER OF APERC DATED 13.12.2017 MAKING APPROVAL OF THE PPA SUBJECT TO THE OUTCOME OF THE IMPUGNED ORDER: ITS EFFECT:

A. SUBMISSION URGED ON BEHALF OF THE RESPONDENT DISCOMS:

Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would submit that the parties had entered and adopted a model PPA in accordance with Regulation 27 of the APERC RE Regulations on 18th February 2017, after the Respondent-AP DISCOMs had filed OP No. 1 of 2017 on 14th February 2017; during the pendency of OP No. 1 of 2017, the Respondent -AP DISCOMs submitted the PPA along with 40 others before the APERC, *inter alia,* seeking consent of the Commission; observing the overlapping issues pending in OP No. 1 of 2017, the APERC had conducted a public hearing for approval of the PPAs.; the parent company of the Appellant i.e., Sembcorp Green Infra Ltd. participated in the public hearing; APERC granted its consent to the PPA in the Approval Order dated 13TH December 2017; while passing the Approval Order, the APERC specifically made the approval subject to the outcome of OP No. 1 of 2017, and thereby the decision in the Impugned Order; and the Appellant has not challenged the Approval Order, either before the APERC or this Tribunal.

Sri Buddy Ranganathan, Learned Senior Counsel, would further submit that reliance has been erroneously placed by the Appellant on ***Gujrat Urja Vikas Nigam Limited & Ors. V. Renew Wind Energy (Rajkot) Private Limited & Ors., 2023 SCC OnLine SC411*** *("***Renew***")* to contend that when a PPA is entered into by the parties based on a model PPA, then, in the absence of a specific regulation requiring its approval, no subsequent approval of the commission is necessitated; the judgment in ***Renew*** is clearly distinguishable, as Section 21(5) of the Andhra Pradesh Electricity Reform Act, 1998 specifically requires the licensees to seek consent for the PPA; in the absence of consent, the PPA entered into by a licensee is void in nature; the Reform Act, 1998, and its application,

has been saved by Section 185(3) of the Act; this position of law has also been upheld by the Supreme Court in **AP Transco & Anr. v. Sai Renewables,** (2011) 11 SCC 34; and in view of the specific condition in the Approval Order, that consent to the PPA would be subject to the outcome of the Impugned Order, as well as the provision for amendment under Article 7 and 11.2 of the PPA, it is clear that the PPA in this case is more akin to that of ***Tarini,*** than to ***Ginni Global.***

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

With respect to the Respondent Discoms' contention that, while the PPA does not specifically provide that the tariff is subject to review/revision, however, the Order dated 31.12.2017 passed by APERC (*"PPA Approval Order"*) approving 41 PPAs, including the Appellant's PPA, states that the PPAs are subject to the outcome of OP No. 1 of 2017 and, accordingly, the tariff under the Appellant's PPA had been made subject to modification by the APERC, Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that these contentions are incorrect for the following reasons: -(a) in the PPA Approval Order, the APERC itself held that there was no requirement of seeking any explicit approval or consent of the PPA in terms of Regulation 27(ii) of the 2015 Regulations [*Model PPAs to be applicable to all wind projects*]; in its Order dated 30.03.2010 in OP No. 40 of 2010, and Order dated 11.08.2014 in OP Nos. 14 to 25 of 2012, the APERC approved the Model PPAs and held that PPAs executed in the format of the Model PPA required no separate consent from the Commission; the PPAs only needed to be filed before the APERC for record; (b) the PPAs were made subject to the outcome of OP Nos. 1 and 5 of 2017 merely because the said OPs were pending adjudication before the APERC; and it cannot be said to grant any power to revisit / modify the tariff under the already concluded PPAs; even otherwise, the Petition (OP No. 1 of 2017) was filed

by the Respondent-Discoms invoking the inherent powers of the APERC under Regulation 55(2) and (3) of the APERC Conduct of Business Regulations, 1999 as amended); and, as held by the Supreme Court in ***Solar Semiconductor*****,** the APERC cannot revise tariff under its inherent powers.

C. JUDGEMENTS UNDER THIS HEAD:

In **Gujrat Urja Vikas Nigam Limited & Ors. V. Renew Wind Energy (Rajkot) Private Limited & Ors., 2023 SCC OnLine SC 411,** the Supreme Court held that amendments to laws, or regulations, unless expressly retrospective, are always prospective, is a settled proposition; in **Purbanchal Cables & Conductors (P) Ltd. v. Assam State Electricity Board, (2012) 6 SCR 905,** the Supreme Court held that any substantive law shall operate prospectively unless retrospective operation is clearly made out in the language of the statute; only a procedural or declaratory law operates retrospectively as there is no vested right in procedure; in the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new liability, the Act cannot be construed to have retrospective effect; in **Commissioner of Income Tax v. Vatika Township (P) Ltd., (2014) 12 SCR 1037,** the Supreme Court observed that, unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation; this proposition was again explained and applied in **Union of India v. Indusind Bank Ltd. (2016) 11 SCR 700;** and agreements, such as the PPAs in the present case, entered into, voluntarily by the parties, before the Second Amendment, were not affected, by its terms.

As the judgement of the Supreme Court, **AP Transco & Anr. v. Sai Renewables, (2011) 11 SCC 34,** has been referred extensively earlier in this order, its contents do not bear repetition under this head.

D. ANALYSIS:

Regulation 27(ii) of the 2015 Regulations relates to model PPAs. The said regulation stipulates that the model Power Purchase Agreements earlier approved by the Commission shall be applicable to all the wind power projects established since these regulations came into force, also to the extent they are in consonance with these regulations. It is not in dispute that the PPA, executed by the Appellant with the AP Discoms on 18.02.2017 was strictly in terms of the model PPA. The tariff stipulated in the said PPA is also in consonance with the generic tariff order passed in OP No.13 of 2016 dated 26.03.2016. The circumstances under which the matter came up before the APERC, and which culminated in the approval order dated 13.12.2017 being passed, is evident from a perusal of the said approval order itself. It is clear therefrom that, after they submitted a letter to the APERC on 23.02.2017 seeking consent of the Commission with respect to the subject PPA, and when both the said request and OP No.1 of 2017 were pending consideration before the Commission, the AP Discoms submitted letter dated 03.03.2017 seeking permission of the Commission to permit them to withdraw the PPAs which were pending for the consent of the Commission, without considering them for grant of consent, on the ground, among others, that every Regulatory Commission had reduced the tariff for wind power projects. In terms of the request of the AP Discoms, the APERC, by its letter dated 23.02.2017, returned all the 41 PPAs without considering the question of grant of consent thereto. Thereafter the AP Power Coordination Committee and the AP Discoms, in their meeting held on 13.07.2017, decided to again re-submit the 41 PPAs withdrawn by them earlier, subject to the outcome of OP No.5 of 2017 wherein the AP Discoms had sought curtailment in the control period of the 2015 Regulations upto 31.03.2017 instead of 31.03.2020 as stipulated originally in the said Regulations. The AP Discoms requested APERC to

consider the 41 PPAs subject to the outcome of the petitions under negotiation process with the developers.

(i). APPROVAL ORDER OF APERC DATED 13.12.2017 REGARDING THE NEED TO SEEK ITS APPROVAL:

The Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL), vide their letters dated 07.06.2016, 06.1.2016, 21.02.2017, 26.06.2017 and 23.02.2017, submitted 41 Power Purchase Agreements, executed by them with the respective wind power project developers, for the consent of the Commission. They later filed OP No. 1 of 2017 with respect to Generation Based Incentive requesting the Commission to amend the wind generators generic tariff orders dated 01.08.2015 and 26.03.2016, in order to pass on the GBI amount to AP Discoms so as to be in compliance with the clause 20 of the 2015 Regulations.

The AP Discoms also filed O.P.No.5 of 2017 to curtail the control period of the 2015 Regulations up to 31-03-2017, and permit the AP Distribution Companies to procure power from the wind producers from 2018-19 through competitive bidding in consonance with the guidelines of MNRE, Government of India and the National Tariff Policy, 2016. While both OP No. 1 of 2017 and OP No. 5 of 2017 were pending consideration before the APERC, the APSPDCL, vide letter dated 03.03.2017, requested the Commission to permit the distribution companies to withdraw the 41 wind power producers' Power Purchase Agreements pending for the consent of the Commission, without considering them for grant of consent, on the ground that, due to advancement of technology, the capacity utilization factor had become higher than what was considered by the Commission in its Regulation or orders; and other State Electricity Regulatory Commissions had reduced the tariff for wind power

projects. By their letter dated 20.03.2017, the APERC returned the subject 41 Power Purchase Agreements without considering the same for grant of consent.

Subsequently, in the meeting held on 13.07.2017, the Andhra Pradesh Power Coordination Committee and the AP Distribution Companies decided to re-submit the 41 Power Purchase Agreements withdrawn earlier, and one Power Purchase Agreement entered into with NREDCAP prior to 31-03-2017, subject to the wind power being within the approved dispatch quantity of 6190.56 MU, subject to the outcome of O.P.No.5 of 2017. The Distribution Companies requested the APERC to consider the issue covering the 41 Power Purchase Agreements entered into earlier by the Discoms and pass orders, subject to the outcome of the petitions and the negotiation process with the developers.

The APERC issued public notice inviting comments/views/ suggestions from all interested persons/stakeholders on the request of the Distribution Companies concerning the 41 Power Purchase Agreements. Sembcorp. in its objections, stated that the Power Purchase Agreement signed by the Appellant for 49.5 MW capacity on 18.02.2017 with the Southern Power Distribution Company of Andhra Pradesh Limited was well within the electricity regulatory framework and strictly as per the model Power Purchase Agreement pre-approved by the Commission; the regulations or the agreement did not talk about any requirement of consent or approval from the Commission except as stated in the letter dated 01.08.2014; the Appellant was supplying energy to the Southern Power Distribution Company of Andhra Pradesh Limited, from their 49.9 MW Kararikonda wind power project, since March, 2017 and had raised invoices amounting to Rs.20.154 Crores; and, therefore, the Southern Power Distribution Company of Andhra Pradesh Limited should be directed to comply with its obligations under the agreement and release the amount against the pending invoices.

In its approval order dated 13.12.2017, with respect to 41 Power Purchase Agreements entered into by APSTDCL with various wind power developers up to the end of FY 2016-17, the APERC noted that the point for consideration was the manner in which the subject wind Power Purchase Agreements had to be justly, fairly, and reasonably considered on merits, in fact and law, and in the best interests of the power sector, the utilities and consumers/ stakeholders in the State of Andhra Pradesh. After taking note of the contents of the 2015 Regulations, the Commission observed that the said Regulations would apply to wind power projects to be commissioned within the State of Andhra Pradesh subsequent to 31.07.2015, and where the tariff is to be determined by the Commission under Section 62 read with Section 86 of the Electricity Act 2003 as Regulation 3; the subject 41 Power Purchase Agreements fell within the ambit and scope of the 2015 Regulations; Regulation 27(ii) made the model PPAs, approved earlier by the Commission, to be applicable to the extent they were in consonance with the 2015 Regulations; these 41 Power Purchase Agreements were claimed to be in the format of the model Power Purchase Agreements approved by the Commission; the developers had contended that, in the light of the earlier letter of the APERC dated 01.08.2014, these PPAs had to be merely filed before the Commission, so that the Commission could certify that they had been entered into following the applicable model PPAs; the developers had also relied on the earlier order of the APERC in OP Nos. 14 to 25 of 2012 dated 11.08.2014 wherein the APERC had opined that Power Purchase Agreements could not be found void for want of the Commission's approval and it was open to the Commission to take on record the PPA without issuing specific orders granting consent; the Commission had also noted that there was no obligation on it under the 2008 Regulations to approve the PPAs executed between the generators and the licensees; the 2008 Regulations only required the Commission to determine the tariff

as per its stipulations; even though its explicit consent to PPAs was not required, it would treat the PPAs as applicable for tariff determination and pass orders; and the Commission had also held that withdrawal of the Power Purchase Agreements earlier by APGENCO was not valid as withdrawal from the agreement was without notice, without capacity and in deviation from the procedure prescribed by the Power Purchase Agreements for dispute resolution.

The APERC thereafter noted the submission of the developers that withdrawal of the 41 subject PPAs, under the letter dated 03.03.2017, was without information or notice to any of the 41 developers, and the return of the agreements by the Commission by its letter dated 20.03.2017 was also without information or notice to the developers and without giving them an opportunity of being heard; no separate consent may be necessary when they are filed before the Commission for record with due certification that they were in the approved model format; the developers had relied on the judgment of APTEL in **NTPC Limited and UP Power Corporation Limited and Others** *(Appeal No. 148 of 2015 dated 04.05.2016)* wherein it was held that once the tariff had been fixed on the basis of the normative parameters, the same should not be re-opened, even if there was any variation between normative and actual; and the developers had sought to emphasize on the weight to be attached to the tariff determined by the Commission in accordance with the 2015 Regulations.

The APERC then observed that the subject Power Purchase Agreements had be dealt with according to the provisions of the 2015 Regulations by which they were governed; the Annual Generic Preferential Tariff fixed under the Regulations would normally apply for the tariff period of 25 years from the date of commercial operation on entering into PPAs in the format of the models earlier approved by the Commission as permitted under Regulation 27(ii) thereof; no part of the 2015 Regulations

prohibited parties from deviating from the Generic Preferential Tariff, and Regulations 22, 23 and 26 may come to the aid of the parties in this regard.

The APERC found considerable force in the contention urged on behalf of the developers that the letter of the APERC dated 01.08.2014 and its order dated 11.08.2014 made any approval or consent, specifically for each Power Purchase Agreement not necessary; and it would suffice to send a copy of the executed Power Purchase Agreement for the record of the Commission. The APERC further observed that, if so, these PPAs may have to be deemed to have been regulated by the Commission; even otherwise, the PPAs made in accordance with the 2015 Regulations and the tariff orders passed there-under could not be considered to be vitiated by any invalidating factors; these wind power generating plants with agreed dates of commercial operation and injecting power into the grid which was being received by the distribution companies, may not be justifiably asked to put the clock back, more so, when the establishment of these units was actuated by the Wind Power Policy of the State Government and the Regulations made by the State Commission. The APERC concluded holding that the subject Power Purchase Agreements were regulated by the Commission as having its consent and were taken on record.

During the public hearing it was submitted, on behalf of the Appellant, that the PPAs signed by the Appellant on 18.02.2017 was strictly as per the model PPA pre-approved by the Commission; the Regulation or agreement did not talk about the requirement of consent or prior approval from the Commission; the Appellant was supplying energy to AP Discoms since March 2017, and had raised invoices on them; and the Discoms be directed to comply with their obligations under the agreement.

It is in such circumstances that the APERC, in the approval order dated 13.12.2017, found force in the submissions, urged on behalf of the

wind power generators, that the earlier letters and order of the Commission made approval or consent specifically for each Power Purchase Agreement unnecessary, and it would suffice to send a copy of the executed Power Purchase Agreement for the record of the Commission; and, if so, these PPAs may have to be deemed to have been regulated by the Commission; even otherwise, the PPAs, in accordance with the 2015 Regulations and the tariff orders passed thereunder, could not be considered to be vitiated by any invalidating factors, and the wind power generators could not be asked to put the clock back specially when they were established in terms of the wind power policy of the State Government, and the Regulations made by the State Commissions. The Commission concluded holding that the PPAs regulated by it was having its consent and were to be taken on record.

(ii). APPROVAL ORDER OF APERC DATED 13.12.2017 REGARDING THE LEGAL CONSEQUENCES OF FILING OP NO.1 OF 2017:

In its approval order dated 13.12.2017, with respect to 41 Power Purchase Agreements entered into by APSTDCL with various wind power developers up to the end of FY 2016-17, the APERC observed that the other issues were needed to be gone into in depth in O.P.Nos.1 and 5 of 2017, and whatever legal consequences flowed from the orders in those petitions would be binding on the parties to the Power Purchase Agreements to the extent relevant to each of them. After stating that the orders herein would be subject to the final result of O.P.Nos.1 and 5 of 2017, the APERC observed that, by so holding, it would only be recording the legal effect, and whether any of the present wind power developers will be subjected to such impact will have to be clarified in such orders.

The APERC made it clear that, if any legal consequences flowed from the orders that may be passed in OP No. 1 of 2017 and OP No. 5 of 2017 which were pending before the Commission, the parties to the PPAs should be bound by them; the terms and conditions incorporated in the PPAs shall be subject to any modification in the manner provided by the PPAs themselves; and, where the interest of the public or consumers or stakeholders is involved, it is open to the Commission to revisit the terms and conditions of the PPAs including determination of the tariff in the manner provided by the Power Purchase Agreements and provided by the provisions and principles of law.

The APERC concluded holding that the Power Purchase Agreements and the parties thereto shall be bound by the legal consequences that may flow concerning each of them from the order that may be passed or the directions that may be given in OP No.1 of 2017 and OP No.5 of 2017 on the file of the Commission; and any and all incentives/ conditions envisaged in the Articles of the Power Purchase Agreements were subject to modification from time to time as per the directions of the Andhra Pradesh Electricity Regulatory Commission as agreed under Article 7 of the Power Purchase Agreements.

It is clear, from the above referred approval order of the APERC dated 13.12.2017, that, on the legal consequences of OP No. 1 of 2017 filed by AP Discoms, the APERC held that whatever legal consequences flowed from OP No.1 of 2017 would bind the parties to the PPA to the extent relevant to each of them and, by holding that the orders passed on 13.12.2017 would be subject to the final result of OP Nos.1 and 5 of 2017, it was only recording the legal effect; and whether any of the present wind power developer would be subject to such impact will have to be clarified in such orders.

All that the Commission has done is merely to clarify the legal consequences of pendency of OP Nos. 1 and 5 of 2017 before the Commission when it passed the order dated 13.12.2017, and nothing more. Irrespective of what the APERC has observed, in its order dated 13.12.2017, it cannot be disputed that any PPA, executed during the pendency of the proceedings before the Commission, would undoubtedly be subject to its result. What is, however, of considerable significance is that the material on record does not disclose the Appellant even having been made aware, when it executed the PPA on 18.02.2017, that the AP Discoms had, just four days prior thereto on 14.02.2017, filed OP No.1 of 2017 seeking amendment of the tariff determined in OP No. 13 of 2016 dated 26.03.2016, and had yet signed the PPA on 18.02.2017 agreeing for a tariff stipulated in OP No. 13 of 2016 dated 26.03.2016 to be firm for a period of 25 years from the commercial operate date, which tariff was to be paid by them to the appellant, in addition to what the appellant received from the Govt of India towards GBI benefit.

XIII. IS THE IMPUGNED ORDER CONTRARY TO THE PROVISIONS OF THE ELECTRICITY ACT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Impugned Order is contrary to the basic tenet of the Electricity Act, specifically Section 61(h) and 86(1)(e) of the Electricity Act, which mandate promotion of power generation from renewable energy sources; the GBI benefit was granted by the Central Government in furtherance of this statutory mandate; however, the Impugned Order has taken away the said benefit, contrary to the provisions of the Electricity Act; further, there is also no material or pleading on record to show / demonstrate that the GBI benefit, which was allowed by the APERC to be deducted from the appellant's monthly bills

on the pretext of consumer interest, has been passed on to the consumers; the invocation of “consumer interest” is a bogey, for there is no analysis (in the Petition or the Impugned Order) as to how the consumer tariff will be impacted by such illegal appropriation of the GBI benefit; a bare reading of the Petition before the APERC would demonstrate that the entire exercise was carried out to overcome the financial difficulties of AP Discoms, and such ways and means were crafted to deny lawful payment under the PPAs to generators of electricity; this case has to be seen from the other steps that were taken whose facts are set out in the judgement of the Andhra Pradesh High Court in ***Ecoren Energy India Pvt. Ltd. & Ors. v. State of Andhra Pradesh & Ors.,*** 2022 SCC OnLine AP 601, to appreciate how the renewable energy generators were treated, solely on account of the inefficiencies of AP Discoms to meet current liabilities; the APERC has actually tried to bale out AP Discoms from financial difficulties for the deductions had started even before the Impugned Order was passed; and the APERC, by modifying its generic tariff orders dated 01.08.2015 and 26.03.2016, with respect to the GBI benefit, has also violated the principle of regulatory certainty, enshrined under Clause 4.0(c) of the Revised Tariff Policy and 5.8.8 of the National Electricity Polic**y.**

B. ANALYSIS:

Clause 4.0 of the Revised Tariff Policy details the objectives of the policy, and among its objectives is clause (c), to promote transparency, consistency and predictability in regulatory approaches across jurisdictions and minimise perceptions of regulatory risks; and (e) promote generation of electricity from Renewable sources. Clause 5.8.8 of the National Electricity Policy requires steps to be taken to address the need for regulatory certainty based on independence of the regulatory commissions and transparency in their functioning to generate investor’s confidence.

It is true that Section 61(1)(h) and 86(1)(e) of the Electricity Act, mandates promotion of power generation from renewable energy sources; and the GBI Scheme of the Govt of India was made to promote generation of electricity through the renewable energy source of wind power.

In the petition filed by them in OP No. 1 of 2017 the AP Discoms stated as under:-

"… that also because of the precarious financial position of the AP Discoms, they were requesting the Commission to effect suitable amendments to its generic tariff orders in OP No. 3 of 2015 dated 01.08.2015 and OP No. 13 of 2016 dated 26.03.2016".

While the request for the earlier generic tariffs to be amended may have been made by AP Discoms also because of their precarious financial position, exercise of power by the APERC, to deny the Appellant the GBI benefit and for it to be a pass through to the AP Discoms (meaning thereby that the generic tariff would be reduced to the extent the Appellants were granted the GBI benefit) is contrary to the GBI scheme formulated by the Government of India, which expressly stipulated that the GBI benefit of Rs. 0.50 per kWh would be over and above the tariff determined by the State Regulatory Commission. While the financial hardship faced by the AP Discoms may not, by itself, justify amendment of the earlier generic tariff order, what we are required to consider is whether or not the amendment to the generic tariff orders, by way of the impugned order, is in accordance with the 2015 Regulations.

XIV. DO SECTIONS 62(4) AND 64(6) OF THE ELECTRICITY ACT CONFER POWER OF AMENDMENT OF A TARIFF ORDER?

A.SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the contention of the Respondent-Discoms,

that APERC has the power to revisit the generic tariff in terms of Section 62(4), 64(6) and 86(1)(b) of the Electricity Act read with Section 21 of the General Clauses Act, is contrary to the scheme of the Electricity Act and the settled position of law; Section 64 (Procedure for tariff order) of the Electricity Act simply prescribes the procedure for making of a tariff order; Section 64(6) provides that the tariff order shall, unless amended or revoked, continue to be in force *for such period* as may be specified in the said tariff order; thus, Section 64(6) is merely a procedural provision and pertains only to the period for which the tariff order will be applicable or remain in force; this has also been recognised by this Tribunal, in ***M/s Siel Ltd. vs. PSERC & Ors.*** [Referred and quoted in ***Kerala HT and EHT Electricity Consumer's Association Productivity House vs. KSERC & Anr.*** *2013 SCC OnLine APTEL 94)*; these principles emerge from the judgments relied upon by the AP Discoms; if the interpretation of the Respondent- Discoms' that Section 64(6) confers power on the Commission to amend the tariff order and, in turn, amend/revisit the tariff, is accepted, there would be a conflict between Sections 62(4) and 64(6); Section 62(4) provides that no tariff or part of any tariff may, ordinarily, be amended more frequently than once in a financial year; thus, if the interpretation placed by the Respondent-Discoms' on the scope of Section 64(6) is accepted, Section 62(4) would become redundant; it is settled law that the provisions of one section of a statute cannot be so read as to render other sections of the statute otiose; Section 62 requires tariff to be determined in terms of the provisions of the Electricity Act i.e., Section 61; further, Section 61 mandates the commission to specify the terms and conditions for determination of tariff i.e., the Tariff Regulations; in the present case, the APERC has notified the 2015 Regulations, which does not confer power on the APERC to 'amend or revisit' the tariff; the power conferred under Section 62(4) should be read in the context of the Regulations that govern cost-plus tariff determination; the MYT

determination process, which contemplates continuous revision of tariff under the Annual Performance Review and True-Up protocols, should be in line with the mandate of Section 62(4) read with the applicable MYT Regulations; but once a generic single part fixed tariff is determined, under a specific Regulation dealing only with renewable electricity, and the tariff is determined for a specified period, then Section 62(4) cannot be relied upon; such reliance would be in violation of the Regulations under which such generic tariff has been determined; and, once Regulations are framed, they are part of the statute.

Sri. Sanjay Sen, Learned Senior Counsel, would also submit that the Impugned Order has not been issued under Section 64(6) or 62(4) of the Electricity Act; rather the APERC, in the Impugned Order, has held that: (a) it is only giving effect to Regulation 20 since, at the time of determination of the generic tariff, there was an inadvertent omission by the APERC in not considering the GBI in the generic tariff so determined; (b) there is no question of any review or amendment of tariff in granting relief to the Respondent Discoms, since passing of GBI benefit only amounts to giving effect to Regulation 20; thus, the contention that the present case is an amendment or a revisiting of the tariff is also wrong for the reason that there was no tariff related exercise that was carried out; tariff, in terms of the Regulations and the Tariff Order, is levelized for a period of 25 years; the tariff parameters (ingredients) are expressly mentioned in the Regulations itself; however, in the present case, the Impugned Order simply allows adjustment of GBI incentive from the monthly bills; unlike the case of Accelerated Depreciation (AD) where, with / without AD, tariff is determined, based on a mathematical formula; and no such exercise has been done in the present case.

Sri. Sanjay Sen, Learned Senior Counsel, would state that the following judgments relied upon by AP Discoms are distinguishable, and

are not applicable in the present case; in all these judgments, the courts have directed amendment / revision of tariff because the applicable regulation therein, or the PPA between the parties, provided for periodic review of tariff; further, even in these judgments, revision/ amendment of tariff was not directed in terms of Section 64(6) or 62(4) of the Electricity Act: -

Relevant Judgment	**Distinguishing factor**
GUVNL vs. Tarini Infrastructure Ltd. & Ors. *(2016) 8 SCC 743*	• In terms of Clause 5.2 of the PPA, the tariff determined by the State Commission was subject to escalation [***Para 6, 14 @Pg. 22, 28, AP Discoms' Compilation***]. No such clause exists in GIWSL's PPA. • The tariff generally in the State was also subject to periodic review in terms of Regulations 23.1 read with 31 of the GERC (Multi Year Tariff) Regulations, 2016. [***Para 13-16 @Pg. 28-29, AP Discoms' Compilation***]. There were no separate tariff regulations for renewable energy projects. No such power exists in Regulation No. 1 of 2015 (which is specific to renewable energy projects) or the Generic Tariff Orders. • Additionally, the Court was taking into consideration subsequent events that put the viability of the renewable energy project at risk.
UPPCL vs. NTPC & Ors. *(2009) 6 SCC 235*	• Regulation 92 of CERC (Conduct of Business) Regulations, 1999 provided power to CERC for revision of tariff [***Para 23, 35, 40 @Pg. 47, 50-51, AP Discoms' Compilation***]. Further, Regulation 103 of the said

	Regulations provided power to CERC to review its orders. [***Para 24 @Pg. 47, AP Discoms' Compilation***] • Hon'ble Supreme Court's observation in Paragraph 35 of the Order that revision of a tariff must be distinguished from review of a tariff order, must be read in the above context. • In any case, no power akin to Regulation 92 of the CERC Regulations exists in the APERC (Conduct of Business) Regulations, 1999 (as amended) nor was there any mention of any such power being exercised in the Impugned Order. • In the facts of the case, the Hon'ble Supreme Court held that CERC had rightly rejected the applications filed by NTPC seeking revision of tariff and CERC should not have been asked to revisit the tariff after everybody had arranged their affairs [***Para 60 @Pg. 56, AP Discoms' Compilation***]. This supports GIWSL's case.
A.P. TRANSCO vs. Sai Renewable Power (P) Ltd. *(2011) 11 SCC 34*	• The energy purchase rates/tariff determined by APERC was subject to escalation/review. The same was also incorporated in Article 2.2 of the PPA [***Para 14, 24, 28, 52, 68-69 @Pg. 73, 76, 78, 87-88, 93, AP Discoms' Compilation***]. • AP Discoms' contention that in paragraphs 68 & 69, the Hon'ble Supreme Court held that even under law, APERC has power to review tariff, is incorrect and based on an incorrect reading of the said paragraphs. The said paragraphs refer to the terms of the PPA, guidelines, APERC order dated 20.06.2021 and GOM Nos. 93 and

	112 issued by the State of AP, which provide for review of tariff. [See ***Para 68-69 read with Paras 48-53 @Pg. 93, 85-88, AP Discoms' Compilation***]. • The fact and circumstances of the case are entirely different and as such there is no principle of the said case that can be made applicable here.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would submit that the APERC is empowered to amend a tariff order under the express provisions of Section 62 (2) and Section 64 (6) of the Act; incorporation of tariff in a PPA does not oust the jurisdiction of the APERC; revision of tariff, and factoring of GBI by the Impugned Order, is in accordance with the APERC RE Regulations; the GBI Scheme, being non-statutory in nature, is not binding on the APERC; the power exercised by the APERC, in amending the Generic Tariff Orders, finds its genesis in Section 62 (4) and Section 64 (6) of the Act; a contiguous reading of these provisions discloses the statutory power of the APERC to amend a tariff order; these provisions (ie Section 62(1) & (4) and Section 64(1) & (6)) empower the commission to amend tariff orders during the period in which they are in force; and this power cannot be excluded by incorporation of tariff in a PPA by a consensual act of the parties.

Sri Buddy Ranganathan, Learned Senior Counsel, would further submit that the Supreme Court, in **Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd:** (2016) 8 SCC 743 ("**Tarini**"), held that the commission continues to have the power to amend a tariff order during its validity, notwithstanding incorporation of tariff in a PPA; in principle,

therefore, the Supreme Court affirmed the position that a tariff order is not inviolable by reason of its incorporation in a PPA; the Supreme Court, in **Tarini,** approved this Tribunal's decision in **Junagadh Power Projects Private Ltd. v. Gujarat Urja Vikas Nigam Ltd.** (2013 SCC OnLine APTEL 146) *("***Junagadh**") on the same principle, holding that the commission has the power to amend tariff orders; in conformity with the above judgments, the Supreme Court once again reiterated this principle in **BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission** (2023) 4 SCC 788 ("**BSES**") that the commission is entitled to alter the tariff *only* by an amendment under Section 64(6) of the Act; in the **BSES** judgement, the Supreme Court, while considering the question whether the commission could alter tariff in a true-up proceeding, held, in this context, that tariff could not be altered at the stage of true-up, in view of the specific procedure for amendment provided for in Section 64(6) of the Act; the appellant contends that OP No. 1 of 2017 was in substance a review, given the fact that the issue of GBI was not raised during the proceedings that culminated in the Generic Tariff Order**;** these assertions are misconceived for the reason that the Supreme Court, in **U. P. Power Corpn. Ltd. v. NTPC Ltd,** (2009) 6 SCC 235, held that an amendment of tariff under Section 64(6) is not circumscribed by the principles of either Order 47 Rule 1 of the Code of Civil Procedure or that of Order 2 Rule 2; it is clear, from a perusal of the relief claimed in OP No. 1 of 2017, that the Respondent-AP DISCOMs sought amendment of the tariff, which power is only traceable to Section 64(6) of the Act; and there is no merit, therefore, in the Appellant's contention that the Impugned Order amounts to review of the Generic Tariff Orde**r.**

C. JUDGEMENTS UNDER THIS HEAD:

(i). In ***M/s Siel Ltd. vs. PSERC & Ors : (2006) APTEL 49,*** some of the Industrial Consumers had questioned determination of tariff by the

Commission on the ground that the effect of the Tariff Order for the year 2005–06 was given from April 1, 2005 while the order was passed on June 14, 2005, and the Commission did not have jurisdiction to require the consumers to pay enhanced tariff from a retrospective date.

This Tribunal held that Section 62, which provides for determination of tariff by the Commission, does not suggest that the tariff cannot be determined with retrospective effect; in the instant case, the whole exercise was undertaken by the PSERC to determine tariff and the annual revenue requirement of the PSERB for the period April, 1, 2005 to March 31, 2006; therefore, logically tariff should be applicable from April 1, 2005; according to sub-section (6) of Section 64 of the Electricity Act, a tariff order unless amended or revoked continues to be in force for such period as may be specified in the tariff order; thus the Commission is vested with the power to specify the period for which the tariff order will remain in force; the Commission deriving its power from Section 64(6) has specified that the order shall come into force from April 1, 2005; no fault can be found with such a retrospective specification of the Commission; and, in view of the provisions of Section 64 (6) of the Act of 2003, the Commission is empowered to specify the period for which the tariff order will remain in force; and, in other words, the Commission is empowered to specify the date on which the tariff order will commence and the date on which it will expire.

(ii) In **Kerala HT and EHT Electricity Consumer's Association Productivity House vs. KSERC & Anr.** 2013 SCC OnLine APTEL 94, this Tribunal followed its earlier judgement in **Siel Ltd.**

(iii) In **GUVNL vs. Tarini Infrastructure Ltd. & Ors.** (2016) 8 SCC 743, the Supreme Court held that Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission; Section 86 which deals with the functions of the Commission, reiterates

determination of tariff to be one of the primary functions of the Commission which determination includes a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s); the power of tariff determination/fixation is statutory; in the present case, the tariff incorporated in PPA between the generating company and the distribution licensee was the tariff fixed by the State Regulatory Commission in exercise of its statutory powers; in such a situation, it was not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent; rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved.

The Supreme Court further observed that, under Section 64(6). a tariff order continues to remain in force for such period as may be specified; in view of Section 86(1)(b), the Court must lean in favour of flexibility and not read inviolability in terms of PPA insofar as the tariff stipulated therein as approved by the Commission is concerned; it would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff; the facts of the present case would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898.

(iv). Regulation 110, the scope of which fell for consideration in **UPPCL vs. NTPC & Ors. (2009) 6 SCC 235**, empowered the Central Commission to issue orders and practice directions in regard to the implementation of the Regulations and procedure to be followed and various matters which the Commission has been empowered by these Regulations to specify or direct. The Supreme Court held that, while exercising its power of review

so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof; revision of tariff must be distinguished from review of a tariff order; whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it; Regulations 92 and 94 do not restrict the power of the Central Commission to make additions or alterations in the tariff; making of a tariff is a continuous process; it can be amended or altered by the Central Commission, if any occasion arises therefor; and the said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion.

(v) In **Junagadh Power Projects Private Ltd. v. Gujarat Urja Vikas Nigam Ltd.** (2013) SCC OnLine APTEL 146), the State Commission on 10.2.2010 floated a discussion paper on determination of tariff for procurement of power by Distribution licensees from biomass based generating plants; the Appellants submitted their objections and suggestions to the discussion paper; on 17.5.2010, the State Commission passed an order determining tariff for procurement of power by Distribution licensees from Biomass based generating plants; the State Commission fixed a generic fuel cost @ Rs. 1600/MT with an escalation of 5% per annum and accordingly, fixed the tariff for biomass projects for 20 years of operation; the State Commission fixed levellised tariffs for first 10 years of operation and for the subsequent 10 years of operation; on 15.7.2010, Gujarat Biomass Energy Developers Association filed a Review Petition against the tariff order dated 17.5.2010 seeking *inter alia*, revision in the biomass fuel cost; however, the State Commission vide its order dated 16.11.2010 dismissed the Petition holding that the same was not

maintainable. On 20.9.2010 Amreli Power Projects Ltd., the Appellant entered into Power Purchase Agreement ('PPA') with GUVNL for sale of power from its biomass project; similar PPA was executed by M/s. Junagadh Power Projects Pvt. Ltd., the Appellant on 26.11.2010; both the PPAs were entered in terms of the tariff determined by the State Commission in its order dated 17.05.2010; the tariff fixed by the State Commission, in its order dated 17.5.2010, was subsequently modified in respect of biomass power projects with air cooled condensers by the State Commission by its order dated 7.2.2011 in Petition no. 985 of 2009 filed by another biomass based generating company, namely M/s. Abellon Clean Energy Ltd. by allowing increase in tariff in biomass power projects using air cooled condensers; the biomass power plants of Amreli and Junagadh Power Projects, the Appellants achieved commercial operation on 1.3.2011 and 22.5.2011 respectively; subsequently, the Appellants filed a Petition being no. 1114 of 2011 & 1113 of 2011 respectively before the State Commission requesting for re-determination of price of biomass fuel in view of the significant hike in the market price of biomass fuel and implementation of the order dated 7.2.2011 passed by the State Commission for increase in tariff for their projects which have air cooled condensers; the State Commission passed the common impugned order dated 10.5.2012 rejecting the prayer of the Appellants with regard to re-determination of price of biomass fuel in view of hike in the price of biomass fuel; however, the State Commission directed to amend the PPA in view of increase in tariff on account of use of air cooled condenser in the power plants of the Appellants in accordance with its order dated 7.2.2011 passed in the case of *Abellon Clean Energy*; and, aggrieved by the impugned order dated 10.5.2012 rejecting the prayer to re-determine the biomass fuel price, the Appellants filed Appeals before this Tribunal.

It is in this context that this Tribunal observed that the State Commission had the power to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which were uncontrollable, and revision in tariff was required to meet the objective of the Electricity Act; the State Commission had the duty to incentivise generation of electricity from renewable sources of energy and, if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period, then the State Commission could revisit the fuel price to avert closure of such plants; however, in such an intervention, the State Commission had to balance the interest of the consumers as well as the generating company.

In view of the factors referred to in the order, this Tribunal opined that the case before it was an appropriate case where the State Commission should examine and consider to re-determine the biomass fuel price; it should not be considered as a review of its earlier order dated 17.5.2010; and, in fact, this should be considered as re-determination of tariff invoking the powers of the State Commission under the Electricity Act, 2003 to review the tariff in the circumstances of the case to avert closure of the biomass fuel based projects in the State.

This Tribunal concluded holding that the State Commission had the power to reconsider the price of biomass fuel and consequently revise the tariff of the biomass based power plants in the State in view of the circumstances of the case as the biomass plants in the State were partially closed and operating at sub-optimal Plant Load Factor due to substantial increase in the price of biomass fuel and in order to avert their closure; and, in the circumstances of the case, this was a fit case for the State Commission to re-consider and re-determine the biomass fuel price.

(vi) In **BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788,** the Supreme Court held that sub-section (6) of Section 64 of the 2003 Act mandates that the tariff order shall continue to be in force for such period as may be specified in the tariff order unless amended or revoked; therefore, if any of the parties were aggrieved by any of the clauses in the tariff order, they were at liberty to seek its amendment or revocation under this provision; and the tariff order made under Section 64 is quasi-judicial in nature and it is binding *as-it-is* on the parties, unless it is amended or modified in a process known to law; revision or re-determination of the tariff, already determined by DERC on the pretext of prudence check and truing up, would amount to amendment of the tariff order, which can be done only as per the provisions of sub-section (6) of Section 64 of the 2003 Act within the period for which the tariff order was applicable; DERC cannot amend the tariff order for the period 1-4-2008 to 31-3-2010 in the guise of "true-up" after the relevant financial year is over and the same is replaced by a subsequent tariff order; this would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over; and it was not permissible to amend the tariff order made under Section 64 of the 2003 Act during the "truing up" exercise.

(vii). In **U. P. Power Corpn. Ltd. v. NTPC Ltd: (2009) 6 SCC 235,** the Supreme Court observed that the 1999 Regulations expressly conferred a power of review on the Central Commission in terms of Regulation 103 thereof; for the aforementioned purpose, the Central Commission may not only exercise its jurisdiction suo motu but it may review a decision even if an application is filed within a period of sixty days of making of any decision, direction or order; Regulation 110 empowers the Central Commission to issue orders and practice directions in regard to the implementation of the Regulations and procedure to be followed and

various matters which the Commission has been empowered by these Regulations to specify or direct; while exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof; revision of a tariff must be distinguished from review of a tariff order; whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it; Regulations 92 and 94 did not restrict the power of the Central Commission to make additions or alterations in the tariff; making of a tariff was a continuous process; it could be amended or altered by the Central Commission, if any occasion arises therefor; and the said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion.

D. ANALYSIS:

Part-VII of the Electricity Act relates to Tariff, and Section 61 there-under relates to Tariff Regulations. Section 61 stipulates that the Appropriate Commission shall, subject to the provisions of the Electricity Act, specify the terms and conditions for determination of tariff and, in doing so, shall be guided by the factors referred to in Clauses (a) to (i) there-under, among which, in terms of clause (h), is the promotion of generation of electricity from renewable sources of energy. Section 62 relates to determination of tariff. Section 62(1) stipulates that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act, among others, for (a) supply of electricity by a generating company to a distribution licensee; and (d) retail sale of electricity. Section 62(4) stipulates that no tariff or part of any tariff may, ordinarily, be amended, more frequently than once in any financial year,

except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

The embargo, under Section 62(4) of the Electricity Act, is for the tariff, or for any part thereof, to be amended more frequently than once in any financial year. It does not disable the Commission from amending the tariff, or any of its part, once in any financial year. In other words, Section 62(4) does not disable the Commission from exercising its power to amend the tariff once every financial year. Further, the words *"ordinarily"* in Section 62(4) would require us to hold that, while the norm is to enable the Commission to amend the tariff, if need be, once in any financial year, in exceptional circumstances the Commission is not disabled from amending the tariff, or any of its part, even more than once in a financial year. It is unnecessary for us to delve into the circumstances in which a tariff order can be amended more than once in a financial year, since the amendment made to the earlier generic tariff orders, by the impugned order, is for the first time and is, therefore, permissible under Section 62(4) of the Electricity Act, 2003.

Section 64 of the Electricity Act relates to procedure for tariff order. Section 64(1) requires an application, for determination of tariff under Section 62, to be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by Regulations. Section 64(6) stipulates that a tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

The tariff order, made under Section 64 of the Electricity Act, is quasi-judicial in nature, and is binding *as-it-is* on the parties, unless it is amended or modified in a process known to law. Revision or re-determination of the tariff, already determined by the Commission, amounts to amendment of the tariff order, which can be done only as per

the provisions of Section 64(6) of the Electricity Act within the period for which the tariff order is applicable. If any of the parties are aggrieved by any of the clauses in the tariff order, they are at liberty to seek its amendment or revocation under Section 64(6) of the Electricity Act. (**BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788).**

Section 64(6) recognises that a tariff order would remain in force for the period specified in the tariff order, unless it is amended or revoked. The stipulation in the generic tariff orders dated 01.08.2015 and 26.03.2016, that the levelized tariff prescribed therein for wind power projects was to remain in force for the entire duration of its useful life of 25 years, would continue to prevail unless, of course, the said tariff order is amended or revoked. While Section 64(6) recognises the possibility of a tariff order being amended or revoked before completion of the period specified therein, and makes it clear that, save any such amendment or revocation, the tariff stipulated in the said order will remain in force for the specified period, the mode, manner and the circumstances in which such a tariff order may be amended or revoked is not stipulated either in Section 64(6) or in any other provision of the Electricity Act. Since power is conferred on the Central Electricity Regulatory Commission under Section 178, and on the State Commissions under Section 181, to make Regulations, it is permissible for the Commissions concerned to frame appropriate Regulations providing for the mode, manner and circumstances in which a tariff order can be amended or revoked.

i. SECTION 21 OF THE GENERAL CLAUSES ACT:

Section 21 of the General Clauses Act assumes relevance, since Section 64(6) does not specify the mode, manner and the circumstances in which a tariff order may be amended or revoked. It is well settled that the purpose of the General Clauses Act is to place in one single statute

different provisions as regards interpretations of words and legal principles which would otherwise have to be specified separately in many different Acts and Regulations. Whatever the General Clauses Act says, whether as regards the meaning of words or as regards legal principles, has to be read into every statute to which it applies. **(Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).**

Section 21 of the General Clauses Act, 1897 reads as under:

"*21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.*

Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions *(if any), to add to, amend, vary or rescind any, orders, rules or bye-laws so issued".*

Section 21 of the General Clauses Act embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue notifications, orders etc. **(Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193),** and must have reference to the context and subject-matter of the particular statute to which it is being applied. (**Kamla Prasad Khetan v. Union of India, 1957 SCC OnLine SC 27).** The said provision is based on the principle that power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst others, specifically deals with the power to add to, amend, vary or rescind notifications/orders. **(Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).**

In terms of the said provision, the Appropriate Commission which has been conferred the power by Sections 178 and 181 of the Electricity Act to make regulations, and under Section 62 (1) read with Section 64(3)(a) to issue a tariff order, would have the power, even in the absence of an

express provision in this regard in the Electricity Act, to amend or repeal the regulations, and amend or revoke the tariff order issued earlier.

By virtue of Section 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, it includes in such power, the power to withdraw, modify, amend or cancel the notifications/orders earlier issued, which can be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. **(Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).** The authority, which has the power to issue Notifications/pass orders, undoubtedly, has the power to rescind or modify or amend those notifications/orders in a like manner and subject to like conditions, if any. **(Pahwa Plastics (P) Ltd. v. Dastak NGO, (2023) 12 SCC 774).** In view of Section 21 of the General Clauses Act, the amending or modifying order has to be made in the same manner as the original order and is subject to the same conditions that govern the making of the original order. **(Rajeev Suri v. DDA, (2022) 11 SCC 1; Kamla Prasad Khetan v. Union of India, 1957 SCC OnLine SC 27).**

It is unnecessary for us to consider the distinction, sought to be made, on behalf of the Appellant, between a generic tariff order and other tariff orders. We shall, for the purposes of adjudicating the present appeal, proceed on the premise that the applicable provisions of the Electricity Act relating to determination of tariff apply equally to generic tariff orders also, though there is no specific provision in the Electricity Act relating to generic tariff orders. While the power to amend or revoke a tariff order would be available to be exercised by the Commission under Section 64(6) of the Electricity Act read with Section 21 of the General Clauses Act, the mode, manner and circumstances in which the power to amend a tariff order can be exercised, must, in view of the mandate of Section 21 of the General Clauses Act, be in terms of the 2015 Regulations.

As noted hereinabove, the generic tariff orders dated 01.08.2015 and 26.03.2016 were made in the manner and in compliance with the conditions stipulated in the 2015 Regulations. The requirement of Section 21 of the General Clauses Act, of the power to amend being exercised in the like manner and subject to like conditions as those which govern the original tariff order, would require the power to amend a tariff order to be exercised in the manner provided, and subject to the conditions stipulated, in the 2015 Regulations. We must, therefore, examine whether the impugned order, in OP.No.1 of 2017 dated 28.07.2018, was passed in accordance with the 2015 Regulations, in terms of which the generic preferential orders dated 01.08.2015 and 25.03.2016 were passed.

ii. CLAUSE 20 OF THE 2015 REGULATIONS:

In the present case, the AP Discoms had requested the APERC to amend its earlier tariff order in terms of clause 20 of the 2015 Regulations, contending that the earlier generic tariff orders were passed in violation of the said clause. It is necessary for us, therefore, to take note of what Clause 20 of the 2015 Regulations stipulates.

Clause 20 of the 2015 Regulations relates to subsidy or incentive by the Government, and read thus:

"The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation (AD) benefit, if availed by the generating company, for the Wind Power Projects while determining the tariff under these Regulations.

Provided that the following principles shall be considered for ascertaining income tax benefit on account of accelerated depreciation, if availed, for the purpose of tariff determination:

a) Assessment of benefit shall be based on normative capital cost, accelerated depreciation, rate as per relevant provisions under the Income Tax Act and Corporate Income Tax Rate.

b) Capitalization of Wind Power Projects during second half of the fiscal year. Per unit levelized accelerated depreciation benefit has to be computed considerng the post-tax weighted average cost of capital as discount factor (as explained in Regulation 8)."

Though Generation Based Incentive has not been explicitly referred to in Clause 20 of the 2015 Regulations, and it is only Accelerated Depreciation benefits availed by the generating company which finds specific mention therein, use of the word *"including"* in Clause 20 would require the Commission, besides Accelerated Depreciation (AD) benefit, to also take into consideration any other incentive or subsidy offered by the Central or State Government. The Generation Based Incentive is an incentive given by the Government of India under the GBI scheme.

In the impugned order, the APERC has interpreted the words *"shall be taken into consideration",* in Clause 20 of the 2015 Regulations, as requiring such incentives to be invariably given credit to in the generic preferential tariff, and for the generation based incentive to be deducted from such tariff. The impugned order reflects the understanding of the APERC that the words "*shall be taken into consideration"* obligated the Commission to give credit to the GBI benefit, received by wind power generators, from the Govt of India, in the final determination of the generic levelized tariff or, in other words, that the Commission had no choice but to factor in and reduce the GBI benefit from the levelized tariff determined in the generic preferential tariff orders dated 01.08.2015 and 26,03,2016.

iii. "CONSIDER": MEANING

The word "consider" merely postulates consideration of the pros and cons of the matter. **(Divisional Personnel Officer, Southern Rly. v. T.R. Chellappan, (1976) 3 SCC 190; Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838).** Consider" means to look at closely and carefully; to think or deliberate on; to take into account. **(Oriental Bank of Commerce v. Sunder Lal Jain, (2008) 2 SCC 280).** The dictionary meaning of the word "consider" is "to think over". **(LIC v. A. Masilamani, (2013) 6 SCC 530; Bhikhubhai Vithlabhai Patel v. State of Gujarat, (2008) 4 SCC 144**).

The dictionary meaning of the word "consider" is "to view attentively, to survey. examine, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think deliberately, to reflect" (vide *Shorter Oxford Dictionary*). According to *Words and Phrases* — Permanent Edition Vol. 8-A "to consider" means to think with care. It is also mentioned that to "consider" is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. **(Barium Chemicals Ltd. v. A.J. Rana, (1972) 1 SCC 240).**

The meaning of the word "consider" is given in the Oxford English Dictionary as *"To contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of".* The relevant definition of the word "consider" given in Webster's Third New International Dictionary is *"to reflect on: think about with a degree of care or caution".* Below this definition are given the synonyms of the word "consider" these synonyms being "contemplate, study, weigh, revolve, excogitate". While explaining the exact different shades of meaning in this group of words, Webster's Dictionary proceeds to state as under with respect to the word 'consider': *"'Consider' often indicates little more than think about. It may occasionally suggest somewhat more*

conscious direction of thought, so mewhat greater depth and scope, and somewhat greater purposefulness" **(Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838).**

Use of the word *"shall take into consideration"* in clause 20 of the 2015 Regulations would only mean that the Commission should think over, reflect on, bestow attentive thought upon the Generation based Incentive Scheme of the Govt of India, whereby an incentive of Rs.0.50 per unit was given by the Govt of India to wind power generators such as the appellant, over and above the tariff determined by the State Commissions. After reflecting upon the GBI Scheme of the Government of India, the APERC was entitled to exercise its discretion, to determine the generic levelized tariff in accordance with the 2015 Regulations, with or without factoring in the GBI benefit. In other words, as long as the APERC was conscious of the GBi Scheme formulated by the Government of India, it was open to it, while determining the generic levelized tariff under the 2015 Regulations, either to deduct or not to deduct the GBI amount, (received by the Wind Power Generators from the Government of India), from the said generic levelized tariff. Exercise of discretion by the APERC, not to deduct GBI from the levelized tariff, would also be justified as it would promote generation of electricity from renewable sources of energy, which is a factor required to be taken into consideration under Section 61(h), and is a function which the APERC is obligated to discharge under Section 86(1)(e) of the Electricity Act.

As noted hereinabove, after the 2015 Regulations were notified in the Andhra Pradesh Gazette on 31.07.2015, the APERC passed the generic preferential tariff order in OP No. 3 of 2015 dated 01.08.2015. The APPCC, on behalf of AP Discoms, had, vide their letter dated 30.10.2015, informed the Commission that, after the 2015 Regulations were framed to determine the tariff for Wind Power projects in the State of Andhra Pradesh for FY 2015-16 to FY 2019-20, the tariff for Wind Power projects was

determined by order dated 01.08.2015 as Rs.4.83 per unit (without AD benefit) and Rs.4.25 per unit (with AD benefit). With respect to subsidy or incentive by the Government, it was submitted that the Commission had not taken into account the GBI provided by the GoI @Rs.0.50 per unit with ceiling limit of Rs.1 Crore/ MW while calculating the capital cost, and had also not considered the submissions of APPCC. They requested that the 2015 Regulations be suitably amended to pass on the GBI incentive to the distribution licensee.

In reply to the said letter dated 30.10.2015, the Secretary, APERC, by its letter dated 15.02.2016, informed APPCC that the 2015 Regulations were notified only on 31.07.2015; its efficacy or otherwise needed to be observed for a reasonably sufficient period of time; and, thereafter, the Commission may take appropriate necessary action as deemed it.

It does appear, from a combined reading of the afore-said letters dated 30.10.2015 and 15.02.2016, that the understanding of both APPCC (representing the AP Discoms), as well as the APERC, was that the 2015 Regulations did not provide for factoring in the Generation based Incentive while determining the levelized tariff. The generic tariff order, in OP No. 13 of 2016 dated 26.03.2016, was passed by the APERC just over a month after the afore-said letter dated 15.02.2016. Similar to its earlier generic tariff order in OP No. 3 of 2015 dated 01.08.2015, the APERC had, in its order in OP No. 13 of 2016 dated 26.03.2016, while noting the useful life of the wind power projects as 25 years, prescribed the levelized generic preferential tariff as Rs.4.84 per unit without considering the Accelerated Depreciation and Rs.4.25 per unit with Accelerated Depreciation; and had stipulated that this tariff shall be applicable for all new Wind Power projects entering into Power Purchase Agreements (PPAs) with AP Discoms on or after 01.04.2016.

In line with their understanding that the 2015 Regulations did not require GBI to be factored in while determining the levelized tariff, the generic tariff order, passed by the APERC on 26.03.2016, makes no specific reference to GBI being required to be reduced from the levelized tariff stipulated therein. Not only did the Commission choose not to amend the 2015 Regulations, it went on to pass the generic tariff order in OP No. 13 of 2016 dated 26.03.2016 in line with its earlier generic tariff order in OP No. 3 of 2015 dated 01.08.2015 wherein also the tariff determined was without taking into account the GBI benefit which the wind power generators were given by the Government of India in addition to the tariff determined by the State Regulatory Commission.

While addressing the APPCC, vide their letter dated15.02.2016, the APERC was conscious of Clause 20 of the 2015 Regulations. as also its earlier generic tariff order in OP No. 3 of 2015 dated 01.08.2015, both of which did not explicitly provide for the generation based incentive to be factored in while determining the levelized tariff for wind power generators, and yet it virtually reiterated, what it had held earlier determined in its order in OP No. 3 of 2015 dated 01.08.2015, in its subsequent order in OP No. 13 of 2016 dated 26.03.2016. As the letter of the APERC dated 15.02.2016 discloses the understanding of the Commission that clause 20 of the 2015 Regulations did not mandate GBI to be factored in while determining the levelized tariff, they must be held to have taken into consideration this fact while passing the generic tariff order, in OP No. 13 of 2016 dated 26.03.2016, just a month later.

As Clause 20 of the 2015 Regulations only requires the Commission to take into consideration, any incentive offered by the Central Government, while determining tariff under the 2015 Regulations, we are satisfied that the APERC was in error in holding, in the impugned order in OP No.1 of 2017 dated 28.07,2018, that its failure to factor in the GBI,

while determining the levelized tariff, would amount to an infringement of Clause 20 of the 2015 Regulations. While it is true that the 2015 Regulations, which came into force with effect from 31.07.2015, is in the nature of subordinate legislation, what is of relevance is the interpretation to be placed on Clause 20 thereof. On its plain and literal reading, clause 20 of the 2015 Regulations only requires the APERC to be conscious of the incentive offered by the Central Government, while determining tariff, and does not mandate the Commission to deduct GBI from the levelized tariff determined by it.

After taking into consideration the GBI Scheme, in terms of which Generation Based Incentive was offered by the Central Govt to wind power generators, the APERC had the discretion either to factor in the GBI benefit while determining the tariff or choose not to do so. It does appear, from its letter dated 15.02.2016 and the subsequent generic tariff order dated 26.03.2016, that the APERC had, after taking into consideration the GBI Scheme, exercised its discretion not to factor in the GBI amount while determining the levelized tariff in its suo-motu generic tariff order dated 26.03.2016, evidently because the said GBI Scheme expressly stipulated that the Generation Based Incentive, being offered to Wind Power Generators, was over and above the tariff to be determined by the State Commissions. Both the generic tariff orders dated 01.08.2015 and 26.03.2016 cannot therefore be said to be in violation of Clause 20 of the 2015 Regulations. As such, the APERC was not justified in entertaining OP No.1 of 2017, whereby AP Discoms had sought that the levelized tariff, stipulated in the generic tariff order dated 26.03.2016, be reduced by the GBI benefit.

As the power to amend the tariff order must, on a conjoint reading of Section 64(6) of the Electricity Act and Section 21 of the General Clauses Act, be exercised in a like manner and subject to like conditions as the original tariff order, exercise of amendment thereof could only have been

undertaken if there was infringement of clause 20 of the 2015 Regulations while passing the generic tariff order dated 26.03.2016. As there was no such infringement, the power to amend the said order was not available to be exercised by the APERC.

iv. APERC 1999 REGULATIONS:

As the power conferred, by Section 21 of the General Clauses Act, on the Appropriate Commission is to amend, vary or revoke the tariff order passed earlier, in a like manner and subject to like conditions, let us now examine whether the Regulations framed by the APERC empowered them to entertain a Petition filed by the AP Discoms to amend/review/vary the generic levelized tariff orders passed earlier. We have already considered clauses 22 to 28 of the 2015 Regulations, and have held the source of power to amend/review/vary the earlier tariff order is not referrable thereto. Let us now examine whether the 1999 Regulations enabled the AP Discoms to invoke the jurisdiction of the APERC requesting it to exercise such a power.

The Andhra Pradesh Electricity Regulatory Commission (Business Rules of the Commission) Regulations 1999 ("the 1999 Regulations" for short) came into force on its publication in the Andhra Pradesh Gazette on 22.07.1999. Chapter VII of the 1999 Regulations is the miscellaneous chapter. Regulation 49, thereunder, relates to review of decisions, directions and orders. Regulation 49(1) enables the Commission, on its own motion or on the application of any of the person or parties concerned, within 90 days of the making of any decision, directions or orders, to pass such appropriate orders as the Commission thinks fit. The restrictions placed on the exercise of the power of review, by the Commission, is for such a power to be invoked within 90 days from the date of the order sought to be reviewed.

OP No. 1 of 2017 was filed on 14th February, 2017, nearly eleven months after the APERC passed the generic tariff order in OP No. 13 of 2016 dated 26.03.2016, under the guise of seeking an amendment thereto. The impugned order was not passed by the APERC suo motu, but in a Petition filed by AP Discoms. The Respondent-Discoms, in effect, sought review of the said tariff order in terms of Regulation 49 of the APERC 1999 Regulations. Clause 49 of the 1999 Regulations is also inapplicable since the scope of review is extremely limited. Even otherwise, while the review jurisdiction of the Commission could only have been invoked within 90 days, the Petition in OP. No.1 of 3017 was filed eleven months after the generic tariff order in OP No. 13 of 2016 was passed on 26.03.2016. In any event, the recitals in OP No. 1 of 2017 show that the AP Discoms did not even claim to have filed the said Petition under Regulation 49, for the said Petition refers to Regulation 55(2) and (3) of the 1999 Regulations.

Regulation 54 of the 1999 Regulations relates to issue of orders and practice directions, It stipulates that, subject to the provisions of the Electricity Act and the 1999 Regulations, the Commission may, from time to time, issue orders and practice directions in regard to the implementation of the Regulations and procedure to be followed on various matters which the Commission has been empowered by the 1999 Regulations to specify or direct.

Regulation 55 relates to saving of inherent power of the Commission. Regulation 55(1) provides that nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission. Regulation 55(2) stipulates that nothing in these Regulations shall bar the Commission from adopting a procedure which is at variance with any of

the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters, and for reasons to be recorded in writing, deems it necessary or expedient. Regulation 55(3) provides that nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Electricity Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.

Regulation 56 is the General power to amend, and thereunder the Commission may, at any time, amend any defect or error in any proceeding before it. Regulation 57 relates to the power to remove difficulties, and thereunder, if any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special order, do anything not being inconsistent with the provisions of the Electricity Act, which appears to it to be necessary or expedient for the purpose of removing the difficulties. Regulation 58 relates to the Power to dispense with the requirement of the Regulations, and thereunder the Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties, to dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be specified.

The impugned order is not referable to Regulation 54 in as much as the Commission has, by the impugned order, not issued any orders or practice directions regarding implementation of the 2015 Regulations or the procedure to be followed on various matters. The impugned order does not even record the Commission having exercised the power under Regulation 55(2) to adopt a procedure at variance with any of the provisions of the 1999 Regulations, The case of the AP Discoms as well

as the APERC is that the generic tariff orders dated 01.08.2015 and 26.03.2016 were passed in violation of Clause 20 of the 2015 Regulations. It is evident, therefore, that Regulations 55(3) of the 1999 Regulations, which enables the Commission to deal with any matter or exercise any power under the Electricity Act for which no Regulations have been framed, also has no application to the present case.

This power conferred on the Commission by Regulation 56, to amend any defect or error in any proceeding before it, is akin to the power exercisable under Section 152 of the Civil Procedure Code and nothing more. The power to remove difficulties under Regulation 57 can be exercised only if any difficulty arises in giving effect to any of the provisions of the Regulations. No such difficulty has been referred to in the impugned order. The APERC has not, by the impugned order, dispensed with the requirements in any of the clauses of the 1999 Regulations and, consequently, Regulation 58 also has no application.

The finding recorded in the impugned order that the APERC was only giving effect to Clause 20 of the 2015 Regulations, with respect to GBI, ignores the fact that, as a consequence of the impugned order, the levelized tariff stipulated in the Generic Tariff Order dated 26.03.2016, which was thereafter incorporated in the PPA, has been reduced by the impugned order. Any such exercise, to interfere with the earlier generic tariff order passed by it on 26.03.2016, could only have been undertaken in accordance with the procedure established by law or in other words, the procedure prescribed by Regulations. The impugned order passed by the APERC, even according to the Commission itself, was neither passed in the exercise of the power of review conferred on them under Regulation 49 nor is it referrable to any of the clauses in Regulations 54 to 58 of the 1999 Regulations

The APERC has held, rightly so, that the power to determine tariff would include the power to amend such tariff in view of Section 21 of the General Clause Act. What the APERC has however not noted, in the impugned order, is that the power to amend the earlier tariff order under Section 21 of the General Clauses Act can only be exercised in the like manner and subject to like conditions as was applicable when the original order was passed. The Commission itself holds, in the impugned order, that the tariff orders dated 01.08.2015 and 26.03.2016 have attained finality, in the absence of any challenge thereto by any stakeholders, but then goes on to hold that all that was sought was to factor in GBI into the tariff which was not the subject matter of the earlier tariff orders. As noted hereinabove, the earlier generic tariff order could only have been amended in terms of the prescribed procedure, and not otherwise.

The chronology of events referred to hereinabove shows that, despite its attention being drawn, by the AP Discoms, to the fact that the 2015 Regulations did not provide for adjustment/ deduction of the GBI from the levelized tariff, stipulated by way of the suo motu Generic Tariff order dated 01.08.2015 passed earlier in terms of the said Regulations, the Commission made it clear that it was not inclined to amend the 2015 Regulations. The subsequent Generic Tariff Order dated 26.03.2016 was passed soon after the Commission had, vide its letter dated 15.02.2016, communicated its disinclination to amend the 2015 Regulations. These events establish that the Commission was fully aware that the GBI benefit had not been factored in or deducted from the levelized tariff determined by it in its Generic Tariff Order dated 01.08.2015, and yet it chose not to amend the 2015 Regulations, and instead passed the Generic tariff order dated 26.03.2016 in more or less identical terms as in its earlier Generic Tariff Order dated 01.08.2015. It is clear, therefore, that the Commission had exercised its discretion, in terms of Clause 20 of the 2015 Regulations,

not to deduct GBI from the levelized tariff determined by it in the suo motu Generic Tariff Orders. It is on the basis of the generic tariff order dated 26.03.2016, stipulating a levellized tariff for the entire useful life of the wind power project for 25 years, that the PPA executed between the Appellant and AP Discoms on 18.02.2017, again for a duration of 25 years, stipulates the tariff payable strictly in terms of the said generic tariff order dated 26.03.2016.

The conclusion of the APERC, in the impugned order, that the relief sought by the AP Discoms in OP No. 1 of 2017 was not an amendment of the tariff orders dated 01.08.2015 and 26.03.2016 is belied by prayer (ii) in the said OP whereby AP Discoms specifically prayed for the tariff order to be amended, and for a condition to be incorporated in the wind generator tariff orders dated 01.08.2015 & 26.03.2016, to pass on GBI amount to APDISCOMs so as to be in compliance with clause 20 of the 2015 Regulations. The finding recorded by the APERC in the impugned order, that the APDISCOMS had only sought a further order supplementing the original order, does not merit acceptance in as much as the effect of giving credit to the GBI incentive would result in reduction in the generic levelized tariff stipulated in OP No. 13 of 2016 dated 26.03.2016, which levelized tariff has been incorporated in the PPA executed by the AP DISCOMS with the Appellant on 18.02.2017.

The effect of the impugned order, in permitting GBI incentive of 50 paise per unit as a pass through, is a resultant reduction in the levelized tariff determined in the generic tariff order passed in OP No. 13 of 2016 dated 26.03.2016 which order, according to the APERC in the impugned order, has attained finality. It does not stand to reason that an order, which the APERC holds as having attained finality, should be revisited even in the absence of any such power being conferred on them either under the Electricity Act or the applicable Regulations.

Viewed from any angle, we are satisfied that the APERC could not have re-visited the generic preferential tariff order dated 26.03.2016, as the said order does not fall foul of clause 20 of the 2015 Regulations, and neither the 1999 nor the 2015 Regulations enabled the AP Discoms to invoke the jurisdiction of the APERC in the manner it did by filing OP.No.1 of 2017 on 14.02.2017.

XV. IS FACTORING OF GBI, AND CONSEQUENT REVISION OF TARIFF, BY THE IMPUGNED ORDER IN ACCORDANCE WITH THE 2015 REGULATIONS?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the ,APERC in terms of the Order passed in OP No. 5 of 2017 dated 13.07.2018, having curtailed the period of the 2015 Regulations from 31.03.2020 to 31.03.2017, could not have thereafter relied on Regulation 20 to allow the Respondent/Discoms' prayer for adjustment of GBI benefits; on the date of issuance of the Impugned Order, the 2015 Regulations had ceased to operate with effect from 01.04.2017; hence, the APERC could not have exercised its statutory powers on the basis of non-existent regulations (***Ecoren Energy India Private Ltd. v. State of Andhra Pradesh & Ors.* 2022 SCC OnLine AP 601**); while issuing the Order in OP No. 5 of 2017 dated 13.07.2018, the APERC had itself saved the PPAs that had been already executed, and had held that no prejudice would be caused to the existing projects; in this context, the APERC confirmed that the 2015 Regulations will continue to operate for old PPAs;; and, hence, the APERC cannot now be permitted to take a different position, for it is also seeking to modify not only the Generic Tariff Orders but also the Order dated 13.07.2018.

Sri. Sanjay Sen, Learned Senior Counsel, would further submit that Regulation 20 does not grant power to the APERC to deduct tariff to the extent of the GBI benefit; all that it provides is that *"the Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation (AD) benefit if availed by the generating company, for the Wind Power Projects while determining the tariff under these Regulations.";* Para 54 of the Impugned Order, in so far as it holds that GBI was inadvertently left out in the determination of generic tariff, is erroneous in law and facts; the APERC, being aware of the GBI Scheme, chose not to include it in the 2015 Regulations, and has kept GBI benefit out of the scope of tariff determination, since (a) Clause 4.6 of the GBI Scheme specifically provides that the GBI benefit is over and above the tariff determined by the State Commissions; (b) Regulation 20 of the 2015 Regulations specifically provides for consideration of Additional Depreciation, and sharing of Clean Development Mechanism (CDM) benefits (in Regulation 18) among the generating company and the AP Discoms, but intentionally left out GBI benefits; it is settled law that the expression of one thing is the exclusion of the other; and (c) none of the Electricity Regulatory Commission have deducted GBI from the generic tariff determined for renewable generators

Sri. Sanjay Sen, Learned Senior Counsel, would contend that the following facts establish that the APERC consciously chose to allow the benefit of GBI to be retained with wind generators, and not to include the same in the Generic Tariff Orders, on the basis of which the appellant had set-up its Project: (a) on 17.12.2009, MNRE notified the GBI Scheme 2009; (b) on 15.11.2012, the APERC passed the Wind Tariff Order, in O.P. No. 13 of 2012, which was applicable till 31.03.2015; during the proceedings before the APERC, the Respondent Discoms had specifically

sought for a pass through of GBI to the Discoms; however, the APERC allowed GBI to be retained with the wind generators; (c) on 31.07.2015, the APERC notified the 2015 Regulations; Regulation 20, provided for the APERC to only consider AD provided to Wind generators at the time of determining tariff; (d) on 01.08.2015, the APERC passed the Generic Tariff Order, without considering GBI for determining tariff; (e) immediately thereafter, on 30.10.2015; the Respondent- Discoms wrote to APERC requesting it to amend the 2015 Regulations to pass on the GBI benefit to the Respondent Discoms, meaning thereby that the Respondent- Discoms also understood that the GBI benefit was not covered under Regulation 20; (f) on 15.02.2016, the APERC responded to the Respondent Discoms' letter dated 30.10.2015, denying the request for amendment of the 2015 Regulations; (g) thereafter, on 26.03.2016, the APERC passed the Generic Tariff Order; again, the APERC chose not to consider GBI benefit while determining the tariff; (h) on 14.02.2017, the Respondent Discoms filed OP No. 1 of 2017 seeking amendment of the Generic Tariff Orders; and (i) on 18.02.2017, the appellant executed the PPA with the Respondent Discoms at the tariff determined by the APERC in the Generic Tariff Order dated 26.03.2016; the exchange of communication between APERC and the Respondent Discoms took place before issuance of the Tariff Order dated 26.03.2016, based on which the appellant's PPA was executed; hence, the finding at para 59 of the Impugned Order that *" [a] inadvertent omission to give effect to clause 20 of the 2015 Regulations in letter and spirit in the said two tariff orders by the Commission…..*" is factually incorrect; the Respondent Discoms have contended that the CERC, in the Statement of Reasons to its 2012 RE Tariff Regulations, has clarified that GBI benefit has to be considered in determination of tariff; the Respondent Discoms are mis-interpreting the CERC's SOR since CERC itself, in its generic tariff orders dated 27.03.2012, 28.02.2013, 15.05.2014, 31.03.2015 and 29.04.2016 issued for FY 2012-13 to FY

2016-17 (i.e., the Control Period of CERC RE Tariff Regulations, 2012) did not deduct the GBI benefit from the generic tariff. .

B. SUBMISSION URGED ON BEHALF OF THE RESPONDENTS:

Sri Buddy Ranganathan, Learned Senior Counsel appearing on behalf of the Respondent-AP Discoms, would submit that, unlike the peculiar circumstances in the case of **Junagadh** and **Tarini,** the present case dire**c**tly necessitated an amendment to the tariff order, for it to be in consonance with the APERC RE Regulations**;** Regulation 20 of the APERC RE Regulations mandated the APERC to factor any incentive or subsidy offered by the Central or State Government, while determining the tariff**;** however, while determining the tariff reflected in the Generic Tariff Orders, the APERC inadvertently omitted to factor the GBI availed by the Appellant under the Extended Scheme, as has been noted in the Impugned Order.; in order to rectify this omission and the inadvertent prejudice cause to AP DISCOMs, the Respondent Commission, by the Impugned Order, exercised its enabling and statutory powers under the Act, and amended the Generic Tariff Orders to bring it in accordance with and give effect to the statutory requirement under Regulation 20; this rectification was made in public interest of the consumers served by the Respondent-AP DISCOMs; the Appellant's reliance on ***Ecoren Energy India Pvt. Ltd. v. State of Andhra Pradesh, 2022 SCC OnLine AP 601*** is misplaced in as much as the GBI and Extended Scheme was never in question before the High Court of Andhra Pradesh; and the issues before this Tribunal are distinct from that judgment, and is limited to the application of Regulation 20 of the APERC RE Regulation as against the GBI Scheme.

C. JUDGEMENTS UNDER THIS HEAD:

We have referred elaborately to the judgement of the Division Bench of the Andhra Pradesh High Court, in **Ecoren Energy India Private Ltd. v. State of Andhra Pradesh & Ors. 2022 SCC OnLine AP 601,** earlier in this order, and are therefore refraining from referring to its contents again under this head.

D. ANALYSIS:

By its order in OP No. 5 of 2018 dated 13.07.2018, whereby the AP Discoms had requested the Commission to curtail the period of the 2015 Regulations up to 31.03.2017, the APERC acceded to their prayer and treated the 2015 Regulations as valid only up to 31.03.2017. The APERC made it clear that the said Regulations would continue to be applicable to all PPAs which were entered into up to 31.03.2017 and were approved by the Commission. Consequently, the 2015 Regulations would continue to apply to the subject PPA as it was executed on 18.02.2017 more than a month prior to 31.03.2017, up to which period, the operation of the 2015 Regulations was curtailed.

It is true that the AP Discoms had, by letter dated 30.10.2015, requested the APERC to amend the 2015 Regulations to provide for the GBI benefit to be passed on from the wind power generators to the Respondent Discoms. A reading of this letter does give an impression that the AP Discoms themselves understood that the 2015 Regulations had not provided for the incentive granted by the Central Government to be a pass through to them. In reply to the said letter, the APERC, by its letter dated 15.02.2016, refused to accede to the request of AP Discoms to amend the 2015 Regulations, and thereafter passed the generic tariff order on 26.03.2016. It is the levelized tariff, stipulated in the generic tariff order dated 26.03.2016, which is the tariff stipulated in the subject PPA.

As observed earlier in this order, it is difficult for us to hold that the APERC, while passing the generic preferential tariff order dated 26.03.2016, had inadvertently omitted to factor the GBI, availed by the Appellant under the extended GBI scheme, as has been observed by it in the impugned order.

It is likewise difficult to accept the submission, urged on behalf of the AP Discoms, that the impugned order was passed to rectify the omission and the inadvertent prejudice caused to AP DISCOMs, since the Commission was well aware of the GBI Scheme, and yet, by its letter dated 15.02.2016, declined to amend the 2015 Regulations. It also went ahead thereafter, and passed the generic tariff order dated 26.03.2016 in more or less similar terms in which the earlier generic tariff order dated 01.08.2015 was passed.

It is also difficult to uphold the impugned order on grounds of public interest, as larger public interest can also be said to be served by promoting generation of electricity from renewable sources of energy which is the mandate of Section 61(h) and the statutory function which the APERC is obligated to discharge under Section 86(1)(e) of the Electricity Act. The GBI Scheme of the Govt of India was introduced to promote generation through wind power which is a renewable source, and the incentive given thereby of Rs.0.50 per unit to wind power generators, over and above the tariff determined by the State Regulatory Commissions, was also in larger public interest.

XVI. CAN THE APERC EXAMINE THE LEGALITY OF THE POLICY OF THE CENTRAL GOVERNMENT?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the APERC, at para 25 of the Impugned

Order, while, *inter alia*, recording the terms of the GBI Scheme (including Clause 4.6 therein), proceeded to hold that *"the Policy dated 17.12.2009 makes no reference to any provision or any statute or rule or regulation and ex-facie appears, from its plain and unambiguous language, to have been issued in exercise of the executive or administrative power of the Ministry of New and Renewable Energy, Government of India*"; in para 52, the APERC also records that the GBI Scheme of the Govt. of India "*does not trace the scheme to any exercise of power by the Govt. of India under the Electricity Act or any rule or regulation made there-under ….*"; but, then (being a creature of the specific statute), the APERC proceeds to hold in para 26 (two lines before the end) that *"…..such unilateral advantage to those who opt for GBI scheme in contrast with those who opt for Accelerated Depreciation benefit cannot be considered fair or reasonable, just or equitable, or based on any reasonable classification based on intelligible criteria. Such a differential treatment to similarly or identically placed wind generator may be offending the fundamental right of equality before law and equal protection of law*."; surely a statutory sector regulator, while exercising his statutory jurisdiction, cannot examine the legality and/or efficacy of a Central Government policy; the APERC appears to have over-stepped its jurisdiction and embarked upon judicial review of the Central Government policy, which it is incompetent to do; the stand of APERC, as is discernible from the Impugned Order, violates the core objectives of the GBI Scheme and the express terms contained in Clause 4.6 therein; and when the Electricity Act mandated the Commission to promote renewable energy generation, to take away/appropriate an incentive given by the Central Government violates a core provision of the statute itself.

B. ANALYSIS:

The Government of India formulated the Generation Based Incentive Scheme, as a matter of policy, whereby a Generation Based Incentive of Rs.0.50 per unit was extended to certain categories of wind power generators. The validity or otherwise of the said scheme could only have been examined in judicial review proceedings, either before the High Courts or the Supreme Court, as, unlike Superior Courts, the APERC is a Tribunal of limited jurisdiction, and must exercise its powers and discharge its functions strictly within the four corners of the Electricity Act under which it was created, and not beyond. The APERC was, therefore, not justified in expressing its opinion on the validity or otherwise of the GBI scheme introduced by the Government of India to encourage wind power generation.

As has been submitted, on behalf of the Appellant, the impugned order does, in effect, negate the GBI policy made by the Government of India. By directing that the GBI benefit, extended to wind power generators, be deducted from the levelized tariff determined earlier, by its generic preferential tariff orders dated 01.08.2015 and 26.03.2016, the APERC has denied the Appellant-Wind Power Generator the benefit of the Generation Based Incentive, and has conferred a benefit on the AP Discoms by a consequent reduction in the generic tariff determined under the afore-said tariff orders, though the GBI scheme makes it clear that the Generation Based incentive, being given to wind power generators, was in addition to the tariff which may be determined by the State Electricity Regulatory Commissions.

We cannot, however, lose sight of the fact that the GBI Scheme is not referable to Section 3 of the Electricity Act, and the Regulatory Commissions, while determining tariff in the exercise of their powers under Sections 62 and 64 of the Electricity Act read with the 2015 Regulations, may not be bound by such a policy. On a conjoint reading of Section 64(6)

of the Electricity Act and Section 21 of the General Clauses Act, the Commission, which has been conferred the power to determine tariff, would have the concomitant power, to be exercised in the like manner and subject to like conditions, to amend the tariff determined earlier. While the Commission may not be justified in making observations touching upon the validity or otherwise of the GBI Scheme formulated by the Government of India, it is unnecessary for us to delve on this aspect any further, since the questions which necessitate examination in these proceedings is whether or not the APERC could have amended the generic tariff orders dated 01.08.2015 and 26.03.2016, on its jurisdiction being invoked by the AP Discoms by way of OP. No.1 of 2017.

XVII. HAS THE TARIFF BEEN AMENDED RETROSPECTIVELY?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Electricity Act, does not empower the APERC to exercise its powers to amend anything retrospectively; any such power has to be traceable from the statute; the attempt to tinker with the tariff already fixed for a period of 25 years, in terms of the Regulations and the Generic Tariff Order, which is also incorporated under the PPA, amounts to a retrospective exercise and is, thus, not permissible; the Supreme Court has held that any statute which, even though operates in future but impacts anything that has happened prior in time or past conduct, is regarded as retrospective; the PPA is the basis on which the project draws finance from banks and institutions, and as such accrued / vested rights are created upon execution of the PPA; the tariff committed in the Tariff Order and the PPA become the basis of financing and a decision by the Promoters to invest; hence, to then tinker with the terms

of the PPA to reduce the tariff would constitute violation of vested and accrued rights; the Supreme Court, in ***GUVNL v. Renew Wind Energy***, 2023 SCC Online SC 411, has held that the PPAs in that case, which were executed prior to the second amendment of the regulation, will not be affected by the terms of the amended regulations; accordingly, even assuming that the generic tariff order can be amended/re-visited, the same can only be applied prospectively i.e. to PPAs executed post amendment / revision of such generic tariff; and, once a PPA has already been executed in terms of a Tariff Order, which provides that the tariff would be fixed for a period of 25 years, the said PPA and the tariff cannot be tinkered.

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would further submit that, if there was any basis to the submissions of the Respondent-AP Discoms', Writ Appeal Nos. 383 of 2019 and batch (Group B) filed by the generators before the Andhra Pradesh High Court, against the maintainability of OP No. 17 of 2019 filed by AP Discoms seeking amendment of the tariff parameters under the 2015 Regulations, generic tariff orders and the concluded PPAs, ought to have been disallowed by the High Court; however, the said writ appeals were rightly allowed by the High Court, holding that the APERC does not have the power to retrospectively tinker with the concluded PPAs. (***Ecoren Energy India Pvt. Ltd. & Ors. v. State of Andhra Pradesh & ors.*** *2022 SCC ONLINE AP 601* ***(PARA 68)***]

B. JUDGEMENTS CITED UNDER THIS HEAD:

In **GUVNL v. Renew Wind Energy**, 2023 SCC Online SC 411, the Supreme Court held that amendments to laws, or regulations, unless expressly retrospective, are always prospective, is a settled proposition. After referring to **Purbanchal Cables & Conductors (P) Ltd. v. Assam State Electricity Board, (2012) 6 SCR 905, Commissioner of Income**

Tax v. Vatika Township (P) Ltd., (2014) 12 SCR 1037, and **Union of India v. Indusind Bank Ltd. (2016) 11 SCR 700,** the Supreme Court held that agreements such as the PPAs in the present case, entered into, voluntarily by the parties before the Second Amendment, were not affected by its terms; and the findings to the contrary in the impugned order, were set aside.

C. ANALYSIS:

Exercise of the power to amend the Generic Tariff Order dated 26.03.2016, in OP. No.1 of 2017, culminated in the impugned order being passed on 28.07.2018. As a result, the levelized tariff of Rs.4.84 per unit determined therein was reduced by Rs.0.50 per unit, consequent on deduction of the GBI benefit from the tariff determined by the said Generic Tarif Order dated 26.03.2016. Since the PPA was executed on 18.02.2017, and the impugned order was passed on 28.07.2018, the effect of the impugned order may have a retrospective effect only for the period, of a little more than one year and five months, between 18.02.2017 and 28.07.2018. It must be borne in mind that the AP Discoms had filed OP. No. 1 of 2017 on 14.02.2017 even before the PPA was executed on 18.02.2017. It is, therefore, possible to contend that the relief granted, by the impugned order dated 28.07.2018, is only for the period after the date on which the subject proceedings were instituted before the APERC.

Since we have already held that exercise of power by the APERC, to amend the Generic Tariff Order dated 26.03.2016, is contrary to law, and the impugned order must be set aside on this score, we see no reason to delve on the retrospectivity issue any further.

XVIII. COULD THE GENERIC TARIFF ORDERS, WHICH HAD ATTAINED FINALITY, BEEN ALTERED?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Generic Tariff Orders were not challenged by AP Discoms and had attained finality; thus the APERC was rendered *functus officio* after the Generic Tariff Orders became final; once a court is rendered *functus officio,* it does not have the jurisdiction to revisit its earlier orders and to amend/ review them to the prejudice of the parties (***Vaayu (India) Power Corporation Pvt. Ltd. vs. APERC:*** (Appeal No. 215 of 2014 dated 02.03.2016); and, in any event, the APERC has not retained the power to revisit the tariff, either under the 2015 Regulations or under the Generic Tariff Orders.

B. JUDGEMENTS CITED UNDER THIS HEAD:

Among the issues which arose for consideration, in **Vaayu (India) Power Corporation Pvt. Ltd. vs. APERC:** (Order of APTEL in Appeal No. 215 of 2014 dated 02.03.2016) was whether the generic wind tariff order dated 01.05.2009 of the State Commission would hold good for the Appellant even when the same order dated 01.05.2009 was non est in view of this Tribunal's Judgment dated 03.05.2011 as alleged by the Appellant?

It is in this context that this Tribunal, after examining the commissioning details of wind power projects and the PPAs of the Appellant, held that it did not find any merit in the present Appeal, since it related to the projects already commissioned with valid PPAs of the Appellant prior to the Judgment dated 03.05.2011 of this Tribunal and the State Commission's Order dated 15.11.2012, indicating therein re-determined tariff of Rs.4.7 per kWh for the PPAs to be executed between 15.11.2012 till 31.03.2015 after considering that the principles laid down in the Tribunal's Judgment dated 03.05.2011 was appropriate and

tenable; if the Appellant was aggrieved by the generic tariff indicated in the State Commission's Order dated 01.05.2009 i.e. Rs.3.5 per kWh, it was open to them to decide whether to accept it and to execute PPAs accordingly or to take up the issue, if the generic tariff of Rs.3.5 per kWh was not acceptable, with the State Commission for review of its order dated 01.05.2009 or any other action it deemed fit, at an appropriate time, consequent upon issuance of the State Commission's Generic Order dated 01.05.2009; it was only after issuance of the State Commission's Order dated 15.11.2012 that the Appellant, with an aim to take advantage of re-determined tariff which was higher than that agreed earlier, made out its case vide its Petition before the State Commission, and had sought re-determination of the tariff which was earlier accepted by the Appellant; this would amount to re-opening of the executed PPAs which were binding contracts upon the concerned parties; and as such, the State Commission had rightly not allowed the same.

C. ANALYSIS:

The APERC has, in the impugned order, held that the Generic Tariff Orders dated 01.08.2015 and 26.03.2016 have attained finality. This observation of the APERC ignores the prayers the AP Discoms in OP No. 1 of 2017 which is to amend the Generic Tariff Order dated 26.03.2016 and provide for deduction of the GBI benefit from the tariff determined therein. As what is sought is for an amendment of the earlier tariff orders, the said tariff order dated 26.03.2016 cannot be said to have attained finality. In any event, this issue, in the light of what we have already held hereinabove, is also academic and does not necessitate any further examination.

XIX. DO THE DOCTRINE OF PROMISSORY ESTOPPEL AND

LEGITIMATE EXPECTATION VITIATE THE IMPUGNED ORDER?

A.SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that the Impugned Order is also hit by the doctrine of promissory estoppel and legitimate expectation since, by virtue of the Generic Tariff Orders, a clear representation was made to the appellant that it would be entitled to such a generic tariff for a period of 25 years; thus, a vested right or vested entitlement was created in favour of the appellant; it is settled law that vested rights cannot be taken away by a new interpretation given to a delegated legislation retrospectively; the APERC cannot exercise jurisdiction to revisit the tariff after issuance of the Generic Tariff Orders, and execution of PPAs based on such Tariff Orders; both the Generic Tariff Order dated 26.03.2016 which provides for a single levelized tariff for the entire useful life of the Project, and the terms of the PPA dated 18.02.2017, amount to a representation and promise based on which the appellant made huge investments to set up the Wind Project; the investment has both components of equity and debt, for which lenders were roped in on the promise of a fixed tariff; the lenders and investors evaluated the bankability of the project based on the terms of the Generic Tariff Order and the PPA; thereafter, the Project was established; the appellant has irreversibly changed its position, having committed itself to running the asset until its useful life; in such circumstances, the respondent AP Discoms cannot renege from its representation and promise; the respondent AP Discoms, who were fully aware of the GBI Scheme and the terms of the Generic Tariff Order and the PPA (since it was the Model PPA which was already approved by APERC), cannot now seek appropriation of the GBI benefit to their account; and, in this regard, reliance is placed on the following judgments: (a) ***Delhi Cloth and General Mills Ltd. vs. Union of India*** (1988) 1 SCC 86; (b) ***Monnet Ispat***

and Energy Ltd. vs. Union of India, (2012) 11 SCC 1; and (c) ***DERC vs. BSES Yamuna Power Ltd.***, (2007) 3 SCC 33,

Sri. Sanjay Sen, Learned Senior Counsel, would further submit that the doctrines of promissory estoppel and legitimate expectation will apply to a statutory body and an entity that falls within the definition of State under Article 12 of Constitution; the APERC, in paragraphs 53 and 54 of the Impugned Order, was wrong in holding that the doctrine of promissory estoppel will not apply to statutory bodies; in this regard, reliance is placed on: (a) ***MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment) Sales Tax & Ors.*** (2006) 8 SCC 702; (b) ***Badri Kedar Paper Pvt. Ltd. vs. Uttar Pradesh Electricity Regulatory Commission & Ors.*** (2009) 3 SCC 754; (c) ***Monnet Ispat and Energy Ltd. vs. Union of India***, (2012) 11 SCC 1; (d) ***Southern Petrochemicals Industries Co. Ltd. vs. Electricity Inspector and ETIO,*** 2007 5 SCC 447; and (e) ***GUVNL vs. GERC & Ors.*** (Judgment of this Tribunal in Appeal 279 of 2013 dated 22.08.2014); if the central policy/scheme is to support the wind generators, then, without the consent of the Central Government and in violation of the terms of the GBI Scheme, the money cannot be diverted to the state distribution company/AP Discoms; and this would be expropriatory and violative of the Appellant's rights under Article 300A of the Constution.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

Sri Buddy Ranganathan, Learned Counsel appearing on behalf of the Respondent-AP Discoms, would submit that It is settled law that a policy or direction of central/state government does not have binding effect on the State Commission, nor can it allow invocation of the principles of promissory estoppel against the State Commission; this position of law has been settled by the Supreme Court in **AP Transco & Anr. v. Sai Renewables** where it was held that policy guidelines issued by the Central/State Government cannot take colour of a definite promise; in

State of West Bengal & Ors v. Gitashree Dutta : (2022) SCC OnLine SC 691, the Supreme Court has held that there can be no estoppel against a statute; the plain and unambiguous language of Regulation 20 of the APERC RE Regulations clearly indicates that any incentive/subsidy accorded to the Appellant was required to be taken into consideration while determining the tariff; and the fact that Regulation 20 was not so taken into consideration, in spite of the mandate of the regulation, will not entitle any generator to claim to be either unaware of the clause or to have understood the clause as conveying anything else than what it plainly does.

C. JUDGEMENTS CITED UNDER THIS HEAD:

In **Delhi Cloth and General Mills Ltd. vs. Union of India** (1988) 1 SCC 86, the Supreme Court held that the doctrine of promissory estoppel only requires that the party asserting the estoppel must have acted upon the assurance given to him; he must have relied upon the representation made to him; it means, the party has changed or altered the position by relying on the assurance or the representation; the alteration of position by the party is the only indispensable requirement of the doctrine; it is not necessary to further prove any damage, detriment or prejudice to the party asserting the estoppel; the court, however, would compel the opposite party to adhere to the representation acted upon or abstained from acting; the entire doctrine proceeds on the premise that it is reliance based and nothing more; the concept of detriment is whether it appears unjust, unreasonable or inequitable that the promisor should be allowed to resile from his assurance or representation, having regard to what the promisee has done or refrained from doing in reliance on the assurance or representation.

In **Monnet Ispat and Energy Ltd. vs. Union of India**, (2012) 11 SCC 1, the Supreme Court held that the following principles must guide a

court where an issue of applicability of promissory estoppel arises: (i) where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. (ii) the doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it. (iii) The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action. (iv) for invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on the promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise. (v) in no case, the doctrine of promissory estoppel can be

pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy. (vi) It is necessary for invocation of the doctrine of promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel. (vii) The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it must not hold the Government or the public authority to its promise, assurance or representation.

In **MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment) Sales Tax & Ors.** (2006) 8 SCC 702, the Supreme Court held that the finding of the High Court, in its judgment, that the notifications being statutory “no plea of estoppel will lie against a statutory notification”, was erroneous; the doctrine of promissory estoppel had been repeatedly applied by the Supreme Court to statutory notifications; and reference may be made to **Pournami Oil Mills v. State of Kerala :1986 Supp SCC 728** in this regard.

Relying on **State of Punjab v. Nestle India Ltd: (2004) 6 SCC 465 and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector [(2007) 5 SCC 447,** the Supreme Court, in **Badri Kedar Paper Pvt. Ltd. vs. Uttar Pradesh Electricity Regulatory Commission & Ors.** (2009) 3 SCC 754, held that the doctrine of promissory estoppel applies also in the realm of a statute.

In **Southern Petrochemicals Industries Co. Ltd. vs. Electricity Inspector and ETIO,** 2007 5 SCC 447, the Supreme Court observed that the doctrine of promissory estoppel also preserves a right; and a right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

In **GUVNL vs. GERC & Ors.** (Judgment of this Tribunal in Appeal 279 of 2013 dated 22.08.2014), the Respondent had altered its position to develop the project on the basis of thePPAs signed with the Appellants; the said PPAs provided a generic tariff determined as per the tariff order on normative principles; in these circumstances the appellant contended that redetermination of the tariff, based on cost plus basis, was in violation of the Doctrine of Promissory Estoppel.

In this context, this Tribunal observed that the undisputed facts showed that all the three ingredients had been satisfied to raise the principles of PromissoryEstoppel; for the principle of Estoppel to be attracted, there had to be a definite and unambiguous representation to a party which should act thereupon and then alone the consequences in law can follow; in the present case, the policy guidelines issued by the Central Government were the proposals sent to the State Government; thereupon, the State Government accepted to consider amending or altering as per the needs andconditions and then they made efforts to achieve the objects of encouraging non-conventional energy generatorsand purchasers to enter into this field; the PPA executed by these parties and their conduct of acting upon such agreements over a longer period would bind them to the rights and obligations stated in the agreements; the parties cannot deny the facts as they existed at the relevant time; the parties would have to abide by the existing facts, the correctness of which they cannot deny.

Relying on **Southern Petrochemical Industries Co Ltd Vs Electricity Inspector and ETIO and Ors, AIR 2007 SC 1984 and Kusumam Hotels (P) Ltd V Kerala Seb 2008 (13) SCC 213,** this Tribunal held that the doctrine of Promissory Estoppel and Legitimate Expectation were applicable in the present case since it was settled position of law that the doctrine of Promissory Estoppel and Legitimate Expectation are applicable when: (a) a party makes an unequivocal promise orrepresentation to the other party, which in effect create legal relations or affect the legal relationship to arise in the future; (b) the other party believing it is induced to act on the faith of it to act to its detriment/to invest. In other words, the party invoking the doctrine has altered its position relying on the promise; and (c) private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty; Legitimate Expectation was capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. (a) Denial of legitimate expectation amounts to denial of rights guaranteed to a party by the Government. In this regard, the following judgments are noteworthy: (i) **Delhi Cloth and General Mills Ltd VsUnion of India (1988) 1 SCC 86; (ii) Monnet Ispat and Energy Ltd vs Union of India (2012) 11 SCC; (iii) Gujarat State Financial Corporation vs M/s. Lotus Hotel Private Ltd (1983) 3 SCC 379;**

This Tribunal further held that, admittedly, the present case was based on the Gujarat Solar Policy, 2009, 2010 Order, Amended Solar Policy, 2010 and the PPA signed with Gujarat Urja; the said PPA provided a generic tariff determined on normative principles; therefore, the present action of Gujarat Urja seeking re-determination of Tariff based on cost plus basis amounts to acting in violation of the Doctrine of Promissory Estoppel and was .liable to be rejected.

In **State of West Bengal & Ors v. Gitashree Dutta** : (2022) SCC OnLine SC 691, the Supreme Court, relying on the Constitution Bench judgements of the Supreme Court in **Thakur Amar Singhji v. State of Rajasthan**, **Electronics Corpn. of India Ltd. v. Secy. Revenue Deptt., Govt. of A.P, A.P. Dairy Development Corpn. Federation v. B Narasimha Reddy,** and **A.P. Pollution Control Board II v. Prof. M.V. Nayudu,** held that there can be no estoppel against a statute.

D. ANALYSIS:

Before examining the submissions under this head, it is useful to understand what the words “Promissory Estoppel” and “Legitimate Expectation, mean; and the scope and ambit of these doctrines.:

i. PROMISSORY ESTOPPEL:

The expression “promisory estoppel” has not been defined by any Statute. But, there occurs in *Halsbury's Laws of England, 3rd Edition, Volume 15, at page 175*, under the caption “Promissory Estoppel”, this passage:

“Where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him. but, he must accept their legal relations subject to the qualification which he himself has so introduced. This doctrine, which is derived from a principle of an equity in 1877, has been the subject of considerable recent development It differs from estoppel properly so-called in that the representation relied upon need not be one of present fact.”

(P. Chinna Reddy v. Collector, 1980 SCC OnLine AP 267)

Where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it. **(Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447;State of Punjab v. Nestle India Ltd: (2004) 6 SCC 465).**

Promissory estoppel, long recognised as a legitimate defence in equity, can found a cause of action against the Government, even when the representation sought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute. **(Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447;State of Punjab v. Nestle India Ltd: (2004) 6 SCC 465).** The doctrine of promissory estoppel preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved. **(Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447).** The well-known preconditions for the operation of the doctrine of promissory estoppel are (*1*) a clear and unequivocal promise knowing and intending that it would be acted upon by the promisee; (*2*) such acting upon the promise by the promisee so that it would be inequitable to allow the promisor to go back on the promise.

(Motilal Padampat Sugar Mills(1979) 2 SCC 409; State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465).

Since the defence taken, on behalf of the AP Discoms, is that there can be no estoppel against the statute, in the present case, the provisions of the Electricity Act and the 2015 Regulations, it is useful to take note of the law laid down in this regard.

In **MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment) Sales Tax & Ors.** (2006) 8 SCC 702, the Supreme Court held that the finding of the High Court, in its judgment, that the notifications being statutory "no plea of estoppel will lie against a statutory notification", was erroneous; the doctrine of promissory estoppel had been repeatedly applied by the Supreme Court to statutory notifications; and reference may be made to **Pournami Oil Mills v. State of Kerala :1986 Supp SCC 728** in this regard.

Relying on **State of Punjab v. Nestle India Ltd: (2004) 6 SCC 465 and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector [(2007) 5 SCC 447,** the Supreme Court, in **Badri Kedar Paper Pvt. Ltd. vs. Uttar Pradesh Electricity Regulatory Commission & Ors.** (2009) 3 SCC 754, held that the doctrine of promissory estoppel applies also in the realm of a statute.

In **Badri Kedar Paper (P) Ltd. v. U.P. Electricity Regulatory Commn., (2009) 3 SCC 754,** the Supreme Court held that, if the Corporation had made a representation pursuant whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply; and the doctrine of promissory estoppel, it is now well settled, applies also in the realm of a statute. (**State of Punjab v. Nestle India Ltd: (2004) 6 SCC 465; and Southern**

Petrochemical Industries Co. Ltd. v. Electricity Inspector: (2007) 5 SCC 447)

On the other hand, in **State of West Bengal & Ors v. Gitashree Dutta** : (2022) SCC OnLine SC 691, the Supreme Court, relying on the Constitution Bench judgements of the Supreme Court in **Thakur Amar Singhji v. State of Rajasthan, Electronics Corpn. of India Ltd. v. Secy. Revenue Deptt., Govt. of A.P, A.P. Dairy Development Corpn. Federation v. B Narasimha Reddy,** and **A.P. Pollution Control Board II v. Prof. M.V. Nayudu,** held that there can be no estoppel against a statute.

In **Motilal Padampat Sugar Mills Co. Ltd. v. State of U. P; (1979) 2 SCC 409, and Kasinka Trading (1995) 1 SCC 274,** the Supreme Court held that the doctrine of promissory estoppel cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which is outside the authority or power of the officer of the Government or of the public authority to make. The doctrine of promissory estoppel would not apply in the teeth of an obligation or liability imposed by law**.** That there can be no estoppel against a statute has been reiterated in **Thakur Amar Singhji v. State of Rajasthan, (1955) 2 SCR 303**, and ***Electronics Corpn. of India Ltd.* v. *Secy. Revenue Deptt., Govt. of A.P., (1999) 4 SCC 458).*** In **A.P. Pollution Control Board II v. Prof. M.V. Nayudu, (2001) 2 SCC 62,** the Supreme Court held that the plea of promissory estoppel would stand negated when the mandate of a statute is followed.

In **State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465,** the Supreme Court held that no representation can be enforced which is prohibited by law in the sense that the person or authority making the representation or promise must have the power to carry out the promise. If the power is there, then subject to the preconditions and limitations noted

earlier, it must be exercised. Thus, if the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute. But if the statute confers power on the Government to grant the exemption, the Government can legitimately be held bound by its promise to exempt the promise.

ii. LEGITIMATE EXPECTATION

Legitimate expectation is a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and does not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable. **(Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447).**

If a denial of legitimate expectation, in a given case, amounts to denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution, but a claim based on mere legitimate expectation, without anything more, cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. (**Attorney General for New South Wales v. Quin (1990) 64 Aust LJR 327 and National Buildings Construction Corpn. v. S. Raghunathan (1998) 7 SCC 66).** To strike down the exercise of

administrative power, solely on the ground of avoiding the disappointment of the legitimate expectations of a person, would be to set the court adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. (**Union of India v. Hindustan Development Corpn. (1993) 3 SCC 499, Attorney General for New South Wales (1990) 64 Aust LJR 327 and S. Raghunathan (1998) 7 SCC 66)**.

A claim based on legitimate expectation requires reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel. (**National Buildings Construction Corpn. v. S. Raghunathan).** Legitimacy of an expectation can be inferred only if it is founded on the sanction of law. (**International Trading Co.).** Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. (**Food Corporation of India v. Kamdhenu Cattle Feed Industries; Independent Gas based Power Producers Association v. Union of India, 2015 SCC OnLine Hyd 41)**

The doctrine of legitimate expectation in the substantive sense has been accepted as part of law, and the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. (**Punjab Communications Ltd. v. Union of India, (1999) 4 SCC 727; State of W.B. v. Gitashree Dutta (Dey), 2022 SCC OnLine SC 691).**

A case for applicability of the doctrine of legitimate expectation, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. **(Sethi Auto Service Station v. Delhi Development Authority (2009) 1 SCC 180).**

Legitimate expectation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. **(Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71).**

For a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some

benefit or advantage which either: (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced **(Council of Civil Service Unions v. Minister for the Civil Service, [(1984) 3 W.L.R. 1174; Chanchal Goyal (Dr): 2003 (2) L.L.N. 415 (SC)).**

An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to a class of persons. **(R. Govinda Rao v. Director, National Institute of Technology, 2005 SCC OnLine AP 980)**. The plea of legitimate expectation would arise where a person is deprived of some benefit or advantage which he had earlier been permitted to enjoy and which he can legitimately expect to be permitted to be continued or that he has received an assurance from the decision-maker that they will not be withdrawn without giving first an opportunity of advancing reasons for contending that they should not be withdrawn.**(R. Govinda Rao v. Director, National Institute of Technology, 2005 SCC OnLine AP 980).**

The doctrine of legitimate expectation is not limited only to cases where there is some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affects a legal relationship which would arise in future. The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made — contractual, administrative or statutory. **(Motilal Padampat Sugar Mills(1979) 2 SCC 409; State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465).**

OP No. 1 of 2017, whereby the Appellant sought amendment of the preferential tariff orders and to incorporate a condition in the Generic Tariff Orders dated 01.08.2015 and 26.03.2016 to pass on the GBI amount to APDISCOMs in compliance with the 2015 Regulations, was filed by APDISCOMs before the APERC on 14.02.2017. Though the APDISCOMs executed the PPA with the Appellant on 18.02.2017, four days thereafter, the said PPA makes no reference to the AP DISCOMs having filed OP No. 1 of 2017 before the APERC just four days earlier. No material has been placed on record to show as to why, despite having filed OP No. 1 of 2017 seeking amendment of the tariff orders to incorporate a condition in the tariff orders dated 01.08.2015 and 26.03.2016 to pass on the GBI amount to them, the AP DISCOMs chose not to await adjudication of OP No. 1 of 2017, and instead entered into the PPA with the Appellant on 18.02.2017 specifically incorporating Clause 2.2 in terms of which the Appellant was required to be paid tariff for energy delivered at the inter-connection point for sale to DISCOM, which shall be firm at Rs.4.84 per unit for a period of 25 years from the Commercial Operation Date (COD) as per APERC Order dated 26.03.2016 in OP No. 13 of 2016. No material has also been placed on record to show that the Appellant was even made aware, when the PPA was executed on 18.02.2017, that the AP DISCOMs had filed OP

No. 1 of 2017 before the APERC just four days earlier on 14.02.2017 seeking reduction of the tariff by deducting therefrom the GBI of Rs.0.50 per kwh. The Appellant was led to believe, when the PPA was executed on 18.02.2017, that the levelized tariff of Rs.4.84 per unit, as stipulated in the order of APERC in OP No. 13 of 2016 dated 26.03.2016, would remain firm for a period of 25 years from the COD, though the AP Discoms were well aware that they had, in effect, sought reduction of the levelized tariff in O.P. No. 1 of 2017 filed by them before the APERC.

As the appellant claims to have altered its position, and to have incurred huge financial expenditure pursuant to their having executed the subject PPA, their reliance on the doctrine of promissory estoppel may well be justified. As larger questions of law, such as whether the appellant's plea of promissory estoppel is contrary to the statutory provisions both in the Electricity Act and in the 2015 Regulations, would require detailed examination, and as we are satisfied that the impugned order necessitates being set aside for the reasons afore-mentioned, we see no reason to undertake an examination as to whether the appellant's plea of promissory estoppel and legitimate expectation justifies their being granted the relief sought for in the present appeal.

XX. IS THE POWER OF THE APERC TO AMEND CONFINED ONLY TO THOSE INCENTIVES ENVISAGED IN THE PPA?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Sanjay Sen, Learned Senior Counsel appearing on behalf of the appellant, would submit that Articles 7 of the PPA provide for modification of incentives from time to time as per APERC's directions; the modifications allowed are limited to incentives which are envisaged in the PPA alone; the PPA envisages only one benefit, being sharing of CDM benefits as per Article 6(xi) of the PPA; apart from CDM benefits, there are

no other incentives envisaged in the PPA; and, accordingly, the APERC can only modify the terms of CDM, and not those of the GBI Scheme.

B.ANALYSIS:

Article 7 of the subject PPA, as noted hereinabove, relates to the duration of the agreement and expressly provides that *"any and all incentive/conditions envisaged in the articles of this agreement are subject to modification from time to time as per the directions of the APERC"*. The power of the Commission to modify incentives, by issuing directions under Article 7 of the PPA, is confined only to such incentives which are envisaged in the subject PPA, and not otherwise. The Appellant may be justified in its submission that the only incentive referred to in the PPA is, in terms of Clause 6.1(XI) thereof, which related to sharing of clean development mechanism benefits. The subject PPA makes no reference to the generation based incentive provided to the Appellant under the extended GBI scheme, 2013 notified by the Central Government on 04.09.2013, possibly because Clause 4.6 of the said scheme expressly stipulates that the said incentive shall be over and above the tariff that may be approved by the State Electricity Commission in various States. In other words, this incentive sanctioned by the Union Government, to enhance the availability of power to the grid, was required not to be taken into account by the State Regulators while fixing the tariff.

The fact, however, remains that Clause 20 of the 2015 Regulations relates to incentives granted both by the Central and the State Govt, and the Generation Based Incentive granted by the Govt of India is one such incentive which would fall within the ambit of the said clause. It would not be possible for us, therefore, to hold that the jurisdiction of the APERC to amend the tariff order is confined only to such incentives as are referred to in the subject PPA.

XXI. CONCLUSION:

For the reasons aforementioned, the Appeal is allowed and the impugned order, passed by the APERC in OP No. 1 of 2017, dated 28.07.2018 is set aside. Consequently, the 2nd and 3rd Respondents shall refund the amounts representing the GBI benefit, illegally recovered from the Appellant, along with simple interest at 12 percent per annum, at the earliest and, in any event, within four months from the date of receipt of a copy of this order. The Appeal stands disposed of accordingly. All other pending IAs, if any, also stand disposed of accordingly.

Pronounced in the open court on this ***19th day of December, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

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REPORTABLE/NON-REPORTABLE